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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 207.

AUGE O. HAMMER, PLAINTIFF IN ERROR,

vs.

THE GARFIELD MINING AND MILLING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED NOVEMBER 21, 1885.

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1 In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

THE GARFIELD MINING AND MILLING COMPANY, Plaintiff,

vs.

AUGE O. HAMMER, JOHN KINNA, and LUCIEN W. BLISS, Defendants.

And now comes the defendant-, and, in pursuance of *his* notice of motion for a new trial, to be based upon affidavits and statement of the case, *and* files this *his* said motion, affidavits, and statement herein.

Be it remembered that on the 24th day of August, A. D. 1883, said plaintiff filed *his* complaint, which is in words & figures as follows, to wit:

2 *Complaint.*

MONTANA TERRITORY, *Lewis & Clarke County:*

In District Court, 3rd Judicial District.

THE GARFIELD MINING AND MILLING COMPANY, Plaintiff,

vs.

AUGE O. HAMMER, JOHN KINNA, and LUCIEN W. BLISS, Defendants.

Now comes the plaintiff and, complaining of the defendants above named, respectfully shows and states—

1. That it is a body politic and corporate duly organized under and existing by virtue of the laws of the State of New York; that it was so organized for the purpose of carrying on the business of mining and milling ores bearing gold, silver, and other precious metals in the Territory of Montana, and that it has duly complied with all of the laws of said Montana Territory relative to foreign incorporations.

2. And plaintiff further shows and states that it is the
3 owner of all and singular that certain quartz lode mining claim situate, lying, and being in Vaughan (unorganized) mining district, in the county of Lewis & Clarke and Territory of Montana, commonly known and called the Garfield lode or mining claim, which said lode or mining claim is surveyed and is designated upon the books and records of the United States surveyor general's office for the Territory of Montana as lot numbered ninety-six (96), of town. numbered eight (8) north, of range numbered five (5) west, of the principal meridian of the Territory of Montana, and said mining claim is more particularly bounded and described as follows, to wit: Commencing at the northeast corner of said claim, marked "M. C. 96," and from which the initial point for said Vaughan mining district bears north 40° 24′ E. distant 7,467 feet, and running thence N. 76° 30′ W. 1,500 feet to the northwest corner of said Garfield lode, marked "M. C. 96;" thence south 10° west 600 feet to the southwest

corner of said lode mining claim, marked "M. C. 96;" thence south 76° 30′ E. 1,500 feet to southeast corner of said Garfield lode, marked "M. C. 96;" thence north 10° east 600 feet to the place of beginning, containing an area of twenty and sixty-two hundredths (20.62) acres; that said premises so described as aforesaid contains the Garfield lode, being a lode or vein of quartz rock or ore in place and containing gold, silver, and other metals; that plaintiff is now, and for a long time hitherto has been, in the possession of said premises, and that plaintiff and its predecessors in interest have been, ever since the discovery and location of said Garfield lode, in the possession of the same and entitled to be so in the possession of said lode mining claim.

3. That, notwithstanding the right of this plaintiff to the possession of said premises and the whole and every part thereof, the above-named defendant, Auge O. Hammer, on or about the 1st day of January, A. D. 1883, assumed to enter upon said premises and to relocate the same, and he caused the same to be recorded in the records of the said county of Lewis & Clarke under the name of the "Kinna lode," and now pretends to claim an interest or estate therein and the possession thereof adversely to this plaintiff, and by virtue of said pretended relocation and under said name of the Kinna lode has made application to the U. S. land office at Helena, M. T., to obtain patent from the United States to said premises.

4. That the above-named defendants, John Kinna and Lucien W. Bliss, likewise claim an estate or interest in said premises and the right to the possession thereof adversely to this plaintiff and also adversely to the said defendant, Auge O. Hammer, which said claim is based upon some pretended relocation of said premises made or pretended to be made on or about the said 1st day of January, A. D. 1883.

5. That plaintiff has duly filed in said land office at Helena, M. T., wherein said application for patent is pending, its adverse claim to said premises so sought to be entered as aforesaid under the name of the Kinna lode, fully setting forth the origin and nature of its said adverse claim, whereby further proceedings in said land office have been and now — and will continue to be stayed until the final determination by a court of competent jurisdiction of the right to the possession of said premises.

6. That the claims of said defendants and all and every of them is without any right whatever, and that said defendants have not nor has any nor either of them any estate, title, interest, or right to the possession of said above mentioned and described mining claim or any part or portion thereof.

Wherefore plaintiff prays—

1. That said defendants and each and every of them may be required to set forth the nature of their and each of their claims, and that all adverse claims of the said defendants may be determined by a decree of this court.

2. That by said decree it be declared, adjudged, and decreed that the said defendants have not nor has any or either of them any in-

terest or estate in or right to the possession of said premises or any part or portion thereof, and that the title of this plaintiff is good and valid to the same and the whole thereof, and that it now is entitled to the possession of said premises and the whole and every part thereof.

7 3. That said defendants and each of them be forever debarred from asserting any claim whatever in or to said Garfield Lode mining claim or any portion thereof, and that plaintiff have such other and further relief as to this court shall seem meet and agreeable to equity, and for costs of suit.

SANDERS & CULLEN,
Att'ys for Plaintiff.

MONTANA TERRITORY, }
Lewis & Clarke County, } *ss:*

W. E. Cullen, being first duly sworn, says that he is one of the attorneys for the above-named plaintiff; that the reason this verification is made by affiant and is not made by the president, secretary, or some other officer or agent of said corporation is because they are not nor is either or any of them now within this (Lewis & Clarke) county, wherein plaintiff's attorneys reside, and they are therefore unable to make this verification; that affiant has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true to the best knowledge, information, and belief of affiant.

8 W. E. CULLEN.

Subscribed and sworn to before me this 24th day of August, A. D. 1883.

[SEAL.] W. F. PARKER,
Notary Public, M. T.

And on the 28th day of August said defendants, Kinna & Bliss, filed the following demurrer to said complaint:

Demurrer of Kinna & Bliss.

Title of cause. Title of court.

Now comes the defendants, John Kinna and Lucien W. Bliss, by their attorney, J. H. Shober, and demurs to the complaint of plaintiff herein, and for cause of demurrer state—

1. That said complaint does not state facts sufficient to constitute a cause of action.

J. H. SHOBER,
Attorney for Kinna & Bliss.

And on the 3rd day of September the defendant Hammer filed the following demurrer:

9 *Demurrer of A. O. Hammer.*

Title of cause. Title of court.

Now comes the defendant, Auge O. Hammer, and demurs to the complaint of the plaintiff herein for the reason that the same does not state facts sufficient to constitute a cause of action.

E. W. & J. K. TOOLE,
For Defendant Hammer.

And said demurrer coming on to be heard the same was by defendant Hammer withdrawn, and leave was taken to file an answer on behalf of said defendant to the complaint.

And on the 12th day of November, 1883, by leave of court, said defendant Hammer filed the following answer to plaintiff's complaint herein:

10 *Answer of Def't Hammer.*

Title of cause. Title of court.

Now comes the defendant, Auge O. Hammer, and, for his separate answer to the plaintiff's complaint herein, says:

First. That as to the matters set up in the first subdivision of said complaint he has not sufficient information upon which to form a belief, and therefore denies that the said defendant ever was or is a a body politic and corporate, or that it has duly complied with the laws of Montana Territory relative to foreign incorporations.

Second. Denies that said plaintiff is the owner of all that certain quartz lode mining claim mentioned and described in said complaint or any part thereof, or that said plaintiff is now or for a long time has been in the possession of said premises or any part thereof, or that it or its predecessors in interest have been ever since the discovery or location thereof in possession of the same or any part thereof, or that they or it are or were entitled to the possession thereof.

11 Third. Denies that this defendant, at the time in said complaint alleged or at any other time, assumed to relocate the said premises or caused any location thereof to be recorded in the records of said Lewis & Clarke county under the name of the Kinna lode or otherwise.

Fourth. Denies that the claim of this defendant is without right or that this defendant has not any estate, title, interest, or right to the possession of said premises or mining claim.

Fifth. And said defendant, further answering, alleges that at all the times hereinafter mentioned he was and still is a citizen of the United States, and that on the first day of January, A. D. 1883, one Iner Wolf, then being a citizen of the United States and entitled to locate, hold, and enjoy vacant mineral lands of the United States, entered upon the said premises in plaintiff's complaint described, the same then and there being vacant mineral lands of the United

States, and discovered thereon a vein or lode of quartz bearing silver and other precious metals and designated and named
12 the same the "Kinna lode," and thereupon the said Iner Wolf staked and marked the same upon the surface thereof, so that the same could be readily traced by reference to permanent monuments and boundaries; and thereafter, to wit, on the — day of January, A. D. 1883, the notice of location and declaratory statement of said discovery and claim was duly filed for record with the county recorder of Lewis and Clarke county, Montana Territory, under oath, containing a sufficient and true description thereof, and in all other respects fully complied with the laws of Congress and of the Territory of Montana in the location and claim thereof.

Sixth. That thereafter, to wit, on the — day of January, A. D. 1883, this defendant became the purchaser of said premises from the said Iner Wolf, and ever since the first day of January, A. D. 1883, this defendant and his predecessor in interest has been the owner of, held possession, and duly represented said "Kinna lode," and ever since said time this defendant has been and now is entitled
13 to the possession of the same.

Seventh. That whatever claim the said plaintiff ever had, if any, to said premises became and was, prior to the first day of January, A. D. 1883, forfeited and of no avail, and since which time it has not had any estate, right, title, interest, or possession in or to said premises, if it ever had any interest therein.

Wherefore this defendant prays that his claim and title to said premises and the possession thereof be adjudged to be good and perfect, and that the said claim of the plaintiff and the other defendants in this action be adjudged to be invalid and of no effect, & for costs of suit.

E. W. & J. K. TOOLE,
Att'ys for Defendant Hammer.

TERRITORY OF MONTANA, *Lewis & Clarke County:*

Auge O. Hammer makes oath and says that he is the defendant answering herein; that he has heard read the foregoing answer and knows the contents; that the same is true of his own knowl-
14 edge, except as to those matters stated on information and belief, and as to those he believes it to be true.

AUGE O. HAMMER.

Subscribed and sworn to before me this 12th day of November, 1883.

JOS. K. TOOLE,
Notary Public, M. T.

And on the 16th day of November, 1883, said plaintiff filed the following replication:

Replication.

Title of cause. Title of court.

Now comes the plaintiff and, replying to the answer of the said Auge O. Hammer—

1. Denies that on the 1st day of January, 1883, or at any other time since the discovery of said Garfield lode, *that* the premises whereon defendant's predecessor in interest pretended to locate his so-called Kinna lode were vacant mineral lands of the United States.

2. Denies that defendant and his predecessor in interest or
15 either or both of them are the owners of the premises whereon the said pretended Kinna lode is located or any part or portion thereof.

3. Denies that the said Iner Wulff, on the said 1st day of January, 1883, or at any other time, ever discovered any vein or lode of quartz bearing silver or other precious metals upon said premises or any part thereof.

4. Denies that said defendant ever purchased said premises of or from said Wulff.

5. Denies that, on the 1st day of January, A. D. 1883, or at any other time, the plaintiff's right to the possession of said premises or the said Garfield lode became or was forfeited or of no avail in any way or manner whatever.

Wherefore plaintiff prays judgment as in its complaint herein.

SANDERS & CULLEN,
Attorneys for Plaintiff.

Here follows verification.

16 And afterwards, to wit, at the November term of said court, said cause coming on to be heard and a jury empaneled to try the issues joined by the aforesaid pleadings, the said plaintiff, to support the issues on his part, introduced the following evidence, to wit:

Plaintiff's Evidence.

THOMAS MCDONALD, a competent witness, testified that "he was employed by one William Schollar to represent the Garfield mining claim in the year 1882; that he worked during the summer of said year on the same for said purpose; that he worked twenty-one days in May in the prospect shaft and two other places, and twelve days in August in discovery shaft, all in said year; that he boarded himself and was paid for said work one hundred and thirty-seven dollars; that he lived in Cataract and came over the trail to the Garfield in May, when he did the first work; the discovery shaft was about fourteen feet deep; found no snow to interfere in going
17 across to the mine, and was paid by Mr. Schollar, who hired me. Wages were about five dollars per day.

WILLIAM SCHOLLAR testified to hiring McDonald for the purposes of representing said mining claim, and that he started there for that purpose, and that he paid him for it, and that there were some building and considerable improvements on the claim—in all of the value of $12,000 to $14,000.

WHIPPLE testified that he saw McDonald about the time mentioned pass his cabin, going in the direction of the claim, and that he (Whipple) worked one day on it. He further testified that he was acquainted with the prices usually paid for doing representative work in the vicinity of the Garfield mine, and that it was $5.00 per day; that where the miner boarded himself the work was reasonably worth five dollars per day.

MARSH testified that he surveyed the claim in 1882 for a patent; was paid ninety-five dollars for it; this did not include
18 assistance had in the survey.

JOHN T. MORGAN testified that he was a partner of McDonald at the time he claimed to do the work on the Garfield mine, and went with him a part of the way, to within 3 or 4 miles of the Garfield mine, in May, 1882; he paid me $50.00 for my share. Witness also testified that on one occasion he had visited the witness McDonald while he (McDonald) was at work on the Garfield lode, which was some time in the month of August, 1882; that he found McDonald at work on said lode claim at a point four or five hundred feet west of the discovery shaft; that said McDonald had sunk a hole at said point nine or ten feet deep, and had disclosed the lead at said point.

WHIPPLE recalled: "Was paid for posting notice on application for patent, in 1882, fifteen dollars."

JOHN T. GRAYSON testified that he was the superintendent
19 of the Garfield Mining and Milling Company; that he purchased said Garfield lode of Julius Horst *et al.* at the date mentioned in their deed of the property to him; that at the time of such purchase his said grantors were in the quiet and peaceable possession of said Garfield Lode mining claim and the whole and every part thereof; that the boundaries of said claim were clearly marked upon the surface by stakes set at the corners thereof and elsewhere on said boundaries, and that said boundaries could be readily traced; that there was discovered thereon a lode of quartz rock in place, bearing gold and silver, such vein having at least one well-defined wall; that he held the quiet and peaceable possession of said lode up to the date of his conveyance thereof to the plaintiff, and that the improvements on said claim made by plaintiff and its predecessors in interest had cost from ten to fourteen thousand dollars; that as such superintendent of plaintiff he paid for representing said mine in 1882 the sum of $137.00, and also caused said lode to be surveyed for a patent and made application there-
20 for in said year, expending for this purpose about the sum of $150.00.

Here plaintiff offered in evidence the certificate of incorporation filed with the recorder of Lewis & Clarke county, M. T.

Defendants objected for the reason that the same was not properly authenticated as required by law, and was not in conformity with the law applicable thereto, and was a copy and the original not accounted for; which objection was overruled, and the defendant then and there excepted, and said certificate — admitted; which certificate is as follows, to wit:

Certificate of Incorporation.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

We, John Kinna, Anton M. Holter, Henry M. Parchen, Rob't C. Wallace, Julius Horst, Jasper A. Viall, and John T. Grayson, all of the county of Lewis & Clarke and Territory of Montana, do by these presents, pursuant to and in conformity with chapter 18 of the act of the Legislative Assembly of the Territory of Montana,
21 passed on the twelfth day of January, one thousand eight hundred and seventy-two, entitled "An act revising, re-enacting, and codifying the general and permanent laws of Montana Territory and the several acts of the said Legislative Assembly amendatory thereof," associate ourselves together and form a company under the name and style of Garfield Mining and Milling Company of Montana, and the following are hereby declared to be—

The corporate name of the said company.
The objects for which the company is formed.
The amount of the capital stock of the said company.
The number of shares of which the said capital stock of the company shall consist.
The term of existence of company.
The number of trustees and their names.
Who shall manage the concerns of the said company for the first three months.
The name of the city, town, and county in which the operations of the said company are to be carried on.

1. The corporate name of the said company is hereby de-
22 clared to be Garfield Mining and Milling Company of Montana.

2. The objects for which the company is formed are as follows: "The mining and milling of ores from the Garfield mine, in the county of Lewis & Clarke, M. T., and such other mines as the company may purchase, lease, or otherwise become possessed of; the purchase and sale of ores, making and erecting all necessary machinery and improvements, and doing all things necessary for the purposes aforesaid.

3. The capital stock of the said company shall be two millions ($2,000,000) dollars, which shall be divided into one hundred thousand shares of twenty dollars each.

4. The said company shall commence on the 10th day of March, in the year one thousand eight hundred and eighty-one, and shall continue in existence for the term of twenty years.

5. The number of trustees shall be seven and their names are John Kinna, Anton M. Holter, Henry M. Parchen, Robert C. Wallace, John T. Grayson, Julius Horst, and Jasper A. Viall.

The names of those who shall manage the concerns of the
23 said company for the first three months are John Kinna, Anton M. Holter, Henry M. Parchen, Robert C. Wallace, John T. Grayson, Julius Horst, and Jasper A. Viall.

6. The name of the city, town, or locality, and county in which the operations of the said company are to be carried on is Helena, Lewis & Clarke county, Montana Territory.

Witness our hands and seals this 10 day of March, 1881.

JOHN T. GRAYSON. [SEAL.]
JOHN KINNA. [SEAL.]
ROB'T C. WALLACE. [SEAL.]
HENRY M. PARCHEN. [SEAL.]
JASPER A. VIALL. [SEAL.]
JULIUS HORST. [SEAL.]
ANTON M. HOLTER. [SEAL.]

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } ss:

On the 10th day of March, in the year one thousand eight hundred and eighty-one, before me, W. E. Cullen, a notary public within and for said Territory, personally came John Kinna, Anton M. Holter, Henry M. Parchen, Rob't C. Wallace, John T. Gray-
24 & 25 son, Julius Horst, and Jasper A. Viall, known to me to be the individuals described in and who executed the foregoing instrument, and who then each acknowledged that they executed the same freely and voluntarily and for the uses and purposes therein expressed.

[SEAL.] W. E. CULLEN,
Notary Public, M. T.

Endorsed: Filed the 12th day of March, 1881. O. B. Totten, county clerk.

Plaintiff then, under proper objections of defendant, offered in evidence certain county records; which objections were overruled, and to which ruling defendant excepted, and thereupon said records were admitted and were as follows, to wit:

26 Plaintiff then, under proper objections of defendant, offered in evidence papers purporting to be the certificate of incorporation of plaintiff and its predecessor in interest, which objections were that the same were not properly acknowledged or authenticated; which objections were overruled, and to which ruling defendant excepted, and thereupon said records were admitted and were as follows, to wit:

Certificate of Incorporation of the Garfield Mining & Milling Co.

We, the undersigned, Milton I. Latham, Edwin R. Weely, Luther C. Voorhies, William N. Coler, Jr., and De Lacey Loucks, all of the city of New York, desiring to form a company for the purpose of mining and milling gold and silver ores and such other ores as may be found in connection therewith and of purchasing or leasing mines for the purpose of carrying on its business and of selling or leasing mines to others and of doing all things necessary and proper therefor in Lewis & Clarke county, in the Territory of Montana, in the United States of America, pursuant to the provisions of
27 the act of the Legislature of New York entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, and of the acts amendatory thereof and supplemental thereto, do, for the purpose of forming said company, certify as follows:

First. The corporate name of said company shall be the Garfield Mining and Milling Company.

Second. The object of which said company is formed are mining gold and silver ores and such other ores as may be found in connection therewith and purchasing or leasing mines for the purpose of carrying on its business and selling or leasing mines to others and doing all things necessary and proper for carrying on its said business in Lewis and Clarke county, in the Territory of Montana, of the United States of America.

Third. The capital stock of said company shall consist of one hundred thousand shares of the value of twenty dollars each, amounting in the aggregate to two millions of dollars.

Fourth. The term of the existence of said company shall be fifty years.

Fifth. The number of the trustees or directors of said company shall be five.

28 Sixth. The names of the trustees or directors who shall manage the concerns of said company during the first year are Milton S. Latham, De Lacey Loucks, William N. Coler, Jr., Luther C. Voorhies, Edwin R. Neeley.

Seventh. The principal office for managing the affairs of said company is to be situated in the city of New York, and the principal part of the business of said company within this State is to be transacted in the city and county of New York, and the company is formed for the purpose of carrying on some part of its business in Lewis and Clarke county, in the Territory of Montana, of the United States of America.

In witness whereof we have hereunto set our hands and seals, at the city of New York, this eleventh day of October, in the year eighteen hundred and eighty-one.

MILTON J. LATHAM. [SEAL.]
ED. R. NEELY. [SEAL.]
L. C. VOORHIES. [SEAL.]
W. N. COLER, JR. [SEAL.]
DE LACY LOUCKS. [SEAL.]

In presence of—
FREDERICK H. MAN.

STATE OF NEW YORK, *City & County of New York:*

29 On this eleventh day of October, 1881, before me personally appeared Milton I. Latham, Edwin R. Neely, Luther C. Voorhies, William N. Coler, Jr., and De Lacy Loucks, to me personally known and known to me to be the individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

FREDERICK H. MAN,
Notary Public, City & County of New York.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

I, William A. Butler, clerk of the city and county of New York, and also clerk of the supreme court of the said city and county, the same being a court of record, do hereby certify that Frederick H. Man, whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was at the time of taking such proof and acknowledgement a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the hand-
30 writing of said notary and verily believe that the signature to the said certificate of proof or acknowledgement is genuine. I further certify that said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed my seal of the said court and county the 11th day of Oct., 1881.

WM. A. BUTLER, *Clerk.*

STATE OF NEW YORK, *City & County of New York:*

I, William A. Butler, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceeding with the original certificate of incorporation of the Garfield Mining and Milling Company, on file in my office, and that the same is a correct duplicate therefrom and of the whole of such original.

Endorsed, filed, and recorded 11th Oct., 1881.

In witness whereof I have hereunto subscribed my hand and affixed my official seal this 11th day of Oct., 1881.

[SEAL.] WM. A. BUTLER, *Clerk.*

31 STATE OF NEW YORK, *ss:*

OFFICE OF THE SECRETARY OF STATE.

I have compared the preceding with the duplicate original certificate of incorporation of Garfield Mining and Milling Company, with acknowledgement thereto annexed, filed and recorded in this office on the twelfth day of October, 1881, and do hereby certify the same to be a correct transcript therefrom and of the whole of the said original.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this 12th day of October, one thousand eight hundred and eighty-one.

JOSEPH B. CARR,
Secretary of State.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

I, Charles Nettleton, a commissioner for the Territory of Montana, duly appointed, commissioned, and sworn, and dwelling in said city of New York, do hereby certify that I have this day carefully examined and compared the foregoing copy of a certain instrument, to wit, certificate of incorporation of the Garfield Mining and
32 Milling Company, and certificate endorsed thereon, of which the foregoing purports to be copies, and, after such examination and comparison, I hereby further certify that the foregoing is a true & correct copy of the said original instrument and of the whole thereof.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of November, A. D. 1881.

[Commissioner'- Seal.]

CHARLES NETTLETON,
Commissioner for Montana Territory in New York,
117 *Broadway, N. Y. City.*

Filed & recorded 21st Nov., A. D. 1881, at 10 o'clock a. m.
O. B. TOTTEN, *Recorder.*

Plaintiff offered in evidence the following copies of deeds on record in the county recorder's office, which were, respectively, objected to by defendant because the originals were not accounted for or shown to be lost; which objections were overruled, and to which ruling defendant then and there excepted, and said copies — admitted accordingly, and which said deeds are as follows, to wit:

33 Julius Horst *et al.* to John T. Grayson.

This indenture, made the twenty-first day of April, in the year of our Lord one thousand eight hundred and eighty-one, between Julius Horst and Eugene F. Hardin, of Helena, M. T., the parties of the first part, and John T. Grayson, of same place, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of twelve thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said party of the second part and to his heirs and assigns forever the following-described real estate and quartz mining lode claim situate, lying, and being in the county of Lewis and Clarke, in the Territory

of Montana, to wit: One undivided one-fourth interest in and to the Garfield Lode claim, situate about fifteen hundred feet south of Vaughan's Little Jennie mine, in the Vaughan mining district, in said county, the said Garfield lode being fifteen hundred feet in length by six hundred feet in width and
34 being bounded as follows, to wit: Commencing at discovery stake and running thence fifty (50) — east to a stake in the center of said lode; thence north three hundred feet to a stake marked "A;" thence west fifteen hundred (1,500) — to a stake marked "B;" thence south six hundred feet to a stake marked "C;" thence east fifteen hundred (1,500) feet to a stake marked "D;" thence north three hundred (300) feet to said center stake, a notice of location of said Garfield lode being recorded in Book E of Lodes, page- 469 & 470, of records of Lewis & Clarke Co., M. T., which said record is hereby referred to for more definite description, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, right of entry and of possession, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold
35 all and singular the said premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JULIUS HORST. [SEAL.]
EUGENE F. HORDIN. [SEAL.]

Signed, sealed, & delivered in presence of—
I. B. PORTER.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

On this twenty-first day of April, A. D. one thousand eight hundred and eighty-one, personally appeared before me, I. B. Porter, a notary public in and for the said county of Lewis and Clarke and Territory of Montana, Julius Horst & Eugene F. Hardin, whose names are subscribed to the annexed instrument as parties thereto, personally known to me te be the same persons described in and who executed the said annexed instrument as parties thereto, and each for himself acknowleged to me that they severally and each for himself executed the same freely and voluntarily and for the uses and purposes therein mentioned.

36 In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL OF NOTARY.]

I. B. PORTER,
Notary Public, Montana Territory.

Filed & recorded April 21, 1881, at 2 o'clock p. m.
O. B. TOTTEN,
County Recorder.

Horst *et al.* t- Grayson.

This indenture, made this 3rd day of December, A. D. 1880, between Julius Horst and Eugene F. Hardin, of the county of Lewis & Clarke and Territory of Montana, the parties of the first part, and John T. Grayson, of the city and county of San Francisco, in the State of California, the party of the second part, witnesseth:

That the said parties of the first part, in consideration of the sum of twenty thousand dollars, lawful money of the United States, the receipt whereof is hereby confessed, have granted, bargained, and sold, and do by these presents grant, bargain, sell, and convey, unto the said party of the second part and to his heirs and assigns forever all and singular the following-described quartz mining
37 property, to wit: The undivided three-fourths of that certain quartz mining claim situate, lying, and being in the Vaughan mining district, in the county of Lewis & Clarke and Territory of Montana, and commonly known and called the Garfield lode, under which said name the said lode was, on the 26th day of August, A. D. 1880, recorded in the office of the county recorder of said Lewis & Clarke county by said parties of the first part, in Book E of Lodes, on page 469, of said records, and also an undivided three-fourths of the Garfield Lode mill site, situated about one-half mile northeast from said lode, together with all and singular the rights, privileges, and franchises thereunto belonging or in anywise appertaining, and also in all the dips, spurs, and angles of said mining claim and in the quartz rock, metals, ores, and minerals therein or thereon contained; to have and to hold, together with the appurtenances, to the said party of the second part and to his heirs and assigns forever.

In testimony whereof the parties of the first part have hereunto subscribed their names the day and year above written.

38 In presence of—
JULIUS HORST.
E. F. HARDIN.

TERRITORY OF MONTANA, } *ss:*
County of Jefferson, }

On this the sixth day of December, A. D. one thousand eight hundred and eighty, personally appeared before me, E. R. Dean, a notary public in and for said county, Julius Horst & E. F. Hardin, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as parties thereto, and duly acknowledged to me that — executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. R. DEAN,
Notary Public.

Filed & recorded Dec'r 6, 1880, at 2.45 o'clock p. m.
O. B. TOTTEN,
County Recorder.

39 Grayson & wife to Garfield M. & M. Co.

This indenture, made on the twenty-sixth day of April, in the year of our Lord one thousand eight hundred and eighty-one, between John T. Grayson and Lizzie T. Grayson, his wife, of Helena, M. T., the parties of the first part, and the Garfield Mining and Milling Company of Montana, a body corporate and politic, the party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim, unto the said party of the second part and to its assigns all and singular that certain quartz mining claim situate, lying, and being about fifteen hundred (1,500) feet south of Vaughan's Little Jennie mine, in the Vaughan mining district, in the county of Lewis and Clarke, in the Territory of Montana, and commonly known and called the Garfield lode, said lode mining claim being fifteen hundred feet in length by six hundred (600) feet in width and
40 being bounded as follows, to wit: Commencing at discovery stake and running thence fifty (50) — east to a stake in the center of said lode; thence north three hundred (300) feet to a stake marked "A;" thence west fifteen hundred (1,500) feet to a stake marked "B;" thence south six hundred feet to a stake marked "C;" thence east fifteen hundred (1,500) feet to a stake marked "D;" thence north three hundred (300) — to said center stake, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed, and all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the said premises,
41 together with the appurtenances and privileges thereto incident, unto the said party of the second part, its assigns, forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN T. GRAYSON. [SEAL].
LIZZIE T. GRAYSON. [SEAL.]

Signed, sealed, & delivered in the presence of—

——— ———.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

On this twenty-sixth day of April, A. D. one thousand eight hundred and eighty-one, personally appeared before me, I. B. Porter, a notary public in and for said county and Territory, John T. Grayson and Lizzie T. Grayson, his wife, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as parties thereto, and who each of them acknowledged to me that they each of them, respectively, executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said Lizzie T. Grayson, wife of the said John
42 T. Grayson, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

I. B. PORTER,
Notary Public, Montana Territory.

Filed & recorded April 27, 1881, at 10.45 o'clock a. m.

O. B. TOTTEN,
County Recorder.

Here plaintiff offered in evidence the record of location of the Garfield mine, which was objected to by defendant for — that it was not in the form required by law, did not contain such a description of the property as was required by law, and because the same did not refer to such natural objects or permanent monuments
43 as would identify the claim; which objection was overruled, & to which defendant excepted; said notice of location — admitted, and is as follows, to wit:

Garfield Lode. Notice of Location.

Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States and the local customs, laws, and regulations, has located fifteen hundred (1,500) linear feet on the above-named lode, situated in Vaughan mining district, Lewis and Clarke county, Montana Territory, and described as follows: Commencing at discovery stake, running fifty feet east to center stake; then three hundred feet north to stake "A;" thence fifteen hundred feet west to stake "B;" thence six hundred feet south to stake "C" and fifteen hundred feet east to stake "D" and three hundred feet north to place of commencement. This lode is located about fifteen hundred feet south of Vaughan's Little Jennie mine and described and located on the 4th day of July, 1880.

44 JULIUS HORST.
E. F. HARDIN.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

Julius Horst, being first duly sworn, says that he and his colocator are citizens of the United States, over the age of twenty-one years; that said location is made in good faith, and matters as stated in the foregoing notice of location by him subscribed are true.

JULIUS HORST.

Subscribed and sworn to before me this 26 day of August, 1880.

[COUNTY SEAL.] O. B. TOTTEN,
County Clerk.

Filed & recorded Aug. 26, 1880, at 3 o'clock p. m.

O. B. TOTTEN,
County Recorder.

Whereupon plaintiff rested.

And the defendant Herman, to support the issues on his side, produced a witness named JACOB FROHNER, who testified as follows, to wit:

45 JACOB FROHNER: "I am well acquainted with the Garfield mining claim; was over the claim in 1881 and know what work was done on the claim that year, and that he had been there again in June, July, and August, 1882."

Defendant then asked of said witness the following question:

"From the examination you made of the discovery shaft in 1881 and in June, July, and August, 1882, are you able to state whether you would have known it if any work had been done in June, 1882, in said shaft?"

Which was objected to by plaintiff. Objection sustained, and defendant excepted. Taken.

Bill of Exception "A."

Title of cause. Title of court.

"Be it remembered that among the proceedings had and done in the above-entitled cause were the following, to wit: The defendant having introduced proof tending to show that no work had been done in the discovery shaft on the claim in dispute, and that
46 the witness had seen and examined the said shaft in the fall of 1881 and in June, July, and August, 1882, thereupon the the defendant offered to prove from the examination he had made of said shaft during the times aforesaid that if any work had been done therein in 1882, prior to August, 1882, he would have known it, the plaintiff theretofore having given evidence that from 10 to 13 days' work had been done in said shaft in June, 1882, and for that purpose defendant, by his counsel, asked the witness the following question:

"From the examination you made of the discovery shaft in 1881 and in June, July, and August, 1882, ere you able to state whether or not you would have known it if any work had been done in June, 1882, in said shaft?"

To the asking of which question the plaintiff then and there objected; which objection was by the court sustained; to which ruling the defendant then and there duly excepted, and this his bill of exception is signed and sealed accordingly.

D. S. WADE, *Judge.*

47 And thereafter defendant produced as witnesses in his behalf—

CHARLES ORTH, who testified that he was familiar with the ground and lode claim in controversy and was familiar with it during the years 1881 and 1882, and that there had been no work done on said claim in 1882; that he is acquainted with the witness, Thomas McDonald; that he saw him near said claim in 1882, about August. He said the Garfield had not been represented in 1882.

A. J. ARNOLD testified that he met McDonald at the time mentioned by "Orth." He said he had been up to the Garfield, but that there was no provisions or tools there and he would not stay.

INER WOLFF testified that he was familiar with the Garfield mining claim and had been ever since it was discovered; that he was on it frequently in 1881 and in July and August, 1882; that he had during those years frequently examined the discovery shaft, and
48 that no work had been done on the discovery shaft in 1882; that he is a miner of large experience and familiar with mining work and earth, and that, in his best judgment, there had never been any work done on that claim in 1882, and that as to discovery shaft he was positive.

Defendant then introduced in evidence his record of location of the "Kinna lode" as follows, to wit:

Kinna Lode.

Notice of location and declaratory statement of and claim to quartz lode mining claim Kinna Lode mining claim, no organized mining district, but called "Vaughan's," Lewis & Clarke and Jefferson counties, Montana Territory.

The undersigned, who are citizens of the United States, hereby declare to all persons concerned that he has discovered a vein or lode within the limits of the claim hereby located, and in said lode a vein or crevice of quartz or ore with at least one well-defined wall, and that he has this 1st day of January, A. D. 1883, located,
49 and do- hereby locate and claim, under and by virtue of chapter six of title thirty-two of the Revised Statutes of the United States and laws amendatory thereto, and the laws of the

Territory of Montana, a mining claim upon said lode or vein, to be designated and named the Kinna quartz lode mining claim, extending along said vein or lode 1,450 feet in a westerly direction and 50 feet in an easterly direction from the center of the discovery shaft, a similar notice, and 300 feet on said side from the middle or center of said lode or vein at the surface, comprising in all 1,500 feet in length along said vein or lode and 600 feet in width, with all the rights and privileges as to surface ground and lodes, veins, or ledges within the boundaries of said claim and otherwise, and the metals, minerals, and valuable deposits of every kind contained in said veins, lodes, or ledges or within said boundaries, which are given or allowed by the laws of the United States aforesaid or of the Territory of Montana. The mining claims hereby located is situated in no organized mining district, called Vaughan's, Lewis & Clarke county, Montana Ter-
50 ritory, and partly in Jefferson county, Montana, and the same is a relocation of what was formerly known as the Garfield lode. The adjoining claims are the Independent Lode claim on the east, French lode claim on the southeast. This location is distinctly marked on the ground, so that its boundaries can be readily traced, by a substantial stake set at discovery shaft, where this notice and statement is posted, this 1st day of January, A. D. 1883, and by substantial posts and monuments at each corner of the claim, and the exterior boundaries of the claim, as marked by said posts and monuments, are as follows, to wit: Beginning at discovery claim stake and running easterly fifty feet, thence N. E. 300 feet; thence westerly 1,500 ft.; thence southerly 600 feet; thence easterly 1,500 feet; thence northeasterly 300 feet; thence westerly 50 feet to place of beginning, at each of which points is a stake formerly set on the ground, marked, respectively, N. E. corner, N. W. corner, S. W. corner, & S. E. corner, and discovery hole, being the same property formerly located and claimed as the Garfield mine. The undersigned intends to hold this claim under and
51 according to the laws of the United States and of the Territory of Montana, and to record this notice and statement under oath in the county recorder's office of said county as provided by law.

Dated this 1st day of January, 1883, and signed.

I. WULFF,
Locator & Claimant.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

Inur Wulff, being duly sworn, says that he is of lawful age and the locator and claimant of the quartz lode mining claim mentioned and described in the foregoing notice and statement of location and claim, and the person whose name is subscribed thereto as such locator and claimant; that he knows the contents of said notice and statement foregoing, and that the matters and things therein stated are true.

INER WULFF.

Subscribed & sworn to before me this 1st day of Jan'y, 1883.
[SEAL.] WM. WALLACE, JR.,
Notary Public.

Filed & recorded Jan'y 1, 1883.

O. B. TOTTEN,
Co. Recorder,
Per J. A. MEEK, *Deputy.*

52 Ivur Wulff to A. O. Hammer.

This indenture, made the thirtieth day of March, in the year of our Lord one thousand eight hundred and eighty-three, between Iver Wulff, of Helena city, Lewis & Clarke county, Montana Territory, party of the first part, and Auge O. Hammer, of the city, county, and Territory aforesaid, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of five hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does, by these presents, remise, release, and forever quitclaim unto the said party of the second part and to his heirs and assigns the whole of that certain lead or lode mining claim known as the Kinna lode, formerly designated as the Garfield lode, situate in the Vaughan mining district, in the county of Lewis & Clarke and Jefferson and Territory of Montana, and more particularly described as follows, to wit: Beginning at discovery stake and running easterly fifty feet; thence northeasterly three hundred feet; thence westerly fif-
53 teen hundred feet; thence southerly six hundred feet; thence easterly fifteen hundred feet; thence northeasterly three hundred feet; thence westerly fifty feet to the place of beginning, at each of which points there is a stake formerly set in the ground marked, respectively, N. E. corner, N. W. corner, S. W. corner, & S. E. corner, and discovery hole, being the same property heretofore located and claimed as the Garfield Lode claim, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law *and* in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever.

In witness whereof the said party of the first part has here-
54 unto set his hand and seal the day and year first above written.

IVER WULFF. [SEAL.]

Signed, sealed, & delivered in the presence of—
—— ——.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

On this 30th day of March, A. D. one thousand eight hundred and eighty-three, personally appeared before me, Wm. Wallace, Jr., a notary public in and for the county & Territory aforesaid, Iver Wulff, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand & affixed my official seal the day & year in this certificate first above written.

[SEAL.] WM. WALLACE, JR.,
Notary Public.

Filed & recorded April 9, 1883, at 11.30 a. m.
O. B. TOTTEN,
County Recorder.

55 Thereupon defendant rested.

And plaintiff thereupon, in rebuttal, introduced four witnesses, who testified that they were acquainted with the witness McDonald and with his reputation for truth and veracity in the neighborhood in which he resided, and that his reputation was good.

And thereupon the court instructed the jury as follows for the plaintiff:

Plaintiff's Instructions.

1. If you believe from the evidence in the case that prior to the 31st day of December, A. D. 1882, the plaintiff was in the quiet and undisputed possession of the premises designated in the complaint as the Garfield lode, the validity of the original location of which is not questioned in the pleadings or testimony, claimed by the defendant as the "Kinna lode;" that the boundaries of said claim were so marked upon the surface as to be readily traced, and
that theretofore there had been discovered within said
56 boundaries a vein or lode of quartz or other rock in place bearing gold, silver, or other precious metals, then this constitutes a *prima facie* case for the plaintiff, which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture or other divestiture and the acquisition of a better right or title by the defendant. Given.

2. There is no conflict in the testimony that the location of this lode as the Garfield lode or mining claim was made subsequent to the passage of the act of Congress of May 10, 1872. It was therefore necessary for the plaintiff, in order to maintain its title to said premises as the Garfield lode, to expend thereon annually not less than one hundred dollars in labor or improvements. If the jury believe from the evidence that the plaintiff expended the sum of one

hundred dollars in labor or improvements upon the Garfield lode in the year A. D. 1882, then the said mine was not subject to relocation on the 1st day of January, A. D. 1883, and your verdict should be for the plaintiff. Given.

57 3. The right of the defendant to recover in this case depends upon the forfeiture, which they allege took place, of plaintiff's right to the premises by reason of the failure of plaintiff to expend in labor or improvement upon the said Garfield lode the sum of one hundred dollars during the year A. D. 1882. The plaintiff being in possession under a location, the validity of which is not questioned, it became the duty of defendant to prove, by a clear preponderance of testimony, that there was a forfeiture, and, unless they have so proved the same to your satisfaction, your verdict should be for the plaintiff. Given.

4. Strict proof of the corporate existence of The Garfield Mining and Milling Company, the plaintiff in this case, is not required. If you are satisfied from the evidence that it is in good faith acting as a corporation, even if it has not in all respects complied with the laws of the Territory governing the same, then it is a corporation *de facto;* and if the proof further satisfies you that prior to the

58 date of the alleged relocation of the premises in controversy the plaintiff was in the possession of the same and during the year 1882 had done work or put improvements on said mining claim of a value equal to or exceeding one hundred dollars, then the defendants would not be entitled to relocate said premises whether the plaintiff had complied with territorial laws governing foreign incorporations or not. There are no disabilities imposed by law on foreign incorporations that would entitle defendants to relocate a *property* properly represented mining claim. The failure of a corporation to file certificates as required by law does not cause the forfeiture of the property of such corporation in this Territory or destroy its right to do business or to sue or be sued therein. The failure to file such certificates only subjects such corporation to the payment of the penalty provided by law, which is not a question in this action. Given.

59 5. You are the sole and exclusive judges of the credibility of the witnesses who have testified before you. It is your duty in passing upon the credibility of the testimony of the several witnesses who have testified before you to reconcile all the different parts of the testimony, if you can, and if you find it practicable to deduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses it is your duty to adopt that theory rather than one which would require you to reject any of the testimony as intentionally false. It is only in cases where it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter and is not corroborated by other evidence that a jury is warranted in disregarding his entire testimony. Given.

6. Evidence has been offered in this case tending to show that the witness McDonald made certain statements out of court and to the witnesses Arnold and Orth which in some degree was at variance

with his testimony from the witness stand. In order to dis-
60 credit a witness in this way two things are necessary: First, that the matter is of a point material to the issues raised by the pleadings in the case, and, second, that the witness actually made the statement imputed to him. If these two elements do not exist, then the testimony does not discredit the witness in any particular. Even should the jury be of the opinion that the witness had made statements to parties when not under oath, which statements were not in entire harmony with his testimony, they would not be justified in disregarding his testimony, but they should give his evidence such weight as they believe it entitled to in view of all the facts and circumstances surrounding the case.

Under the laws of the United States governing the procurement of patents for mineral lands and the instructions thereunder no person can obtain a patent for such lands unless at the time of the application therefor the legal title is shown to be in the party applying. Given.

61 To the filing of instruction No. 1 defendant then and there duly excepted for the reason that the location notice of the plaintiff was invalid in this, that there was no sufficient description contained therein and no proper evidence of any location made by plaintiff or its predecessor in interest, and because the court says to the jury that the validity of the original location is not questioned in the pleadings or evidence, whereas, in fact, the ownership or location is put in issue by the pleadings and the sufficiency of the location notice was raised by objection and exception on the trial; which objection was overruled; to which defendant duly excepted.

To the giving of instruction No. 3 defendant objected for the reason that the court does not require the plaintiff to recover on the strength of its own title, but compels the defendant to prove a forfeiture; which objection was overruled; to which ruling defendant duly excepted.

62 To the giving of instruction No. 4 defendants duly objected for the reason that, under the laws of this Territory, a strict compliance with law is required to enable plaintiff to hold or acquire property, and for the further reason that there could be no possession without a valid location, and that a *de facto* corporation could not acquire such possession; which objection was overruled, and defendant then and there duly excepted thereto.

To instruction No. 4½ defendant objected for the same reason as No. 4, as being against law, and the court, notwithstanding said objections, gave the said instructions; to which said defendant duly excepted; and thereupon the defendant requested the court in writing to give the following instructions:

Defendant's Instructions.

Title of cause. Title of court.

1. The laws of the United States require that at least one hundred dollars' worth of work shall be done annually upon the lode claims

that have been located since May 10, 1872, and upon a failure
63 to do such an amount of work the claim shall be open to relocation in the same manner as if no location thereof had ever been made. You are instructed that the work required to be done is work done for the purpose and as a means of prospecting or working the claim, and this will exclude from your consideration for this purpose all evidence of work or expense in procuring a survey thereof for patent. Given.

2. It devolves upon the plaintiff to establish by a preponderance of the evidence that at least one hundred dollars' worth of work was done on such claim in 1882 for the purpose or as a means of representing or working or improving said claim. Given.

3. You are instructed that any evidence before you as to expenses incurred and paid to any person in visiting said mine and looking after the property of the plaintiff will not be considered by you as work done on the mine or available for the purposes of representation. Given.

64 4. If the witness McDonald claims to have performed from 12 to 13 days' work in what is designated the "discovery shaft," there being but 21 days' work, at $5.00 per day, claimed to have been done on the lead, it is a material fact whether this work in the discovery shaft was or was not done. Given.

5. You are instructed that if you believe from the evidence that any witness has wilfully testified falsely to any material fact in this case you are at liberty to disregard the whole of such witness'*es* evidence. Given.

7. You are instructed that there can be no possession of a lode claim without a valid location, and, in order to make a valid location, the person or persons making the same must have been, at the time of such location, a citizen or citizens of the United States or declared their intention to become such, and if the proof fails to show whether such locators were citizens or had declared
65 their intentions to become such you will find for the defendants. Refused, for the reason that the original location of the Garfield mining claim is not questioned in the pleadings or testimony.

8. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility. Given.

9. You are instructed that before the plaintiff could acquire any right to the property in controversy it was incumbent on the plaintiff to file with the secretary of the Territory and the recorder of Lewis & Clarke county their certificate of incorporation or a copy thereof, and, there being no proof of such facts, you will find for the defendant. Refused.

66 10. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason. This instruction is applicable alike to the witnesses for the plaintiff and for the defendant. Given.

11. The question to be determined by you is whether the necessary work was done in 1882, and not whether the plaintiff paid for the work; for if the necessary work to hold the claim had not been done it was immaterial whether anything was paid or not. Given.

And the court thereupon refused to give instruction No. 7; to which refusal the defendant then and there duly objected, for the reason that plaintiff, under the pleadings, was bound to show everything that was necessary to make a valid location, and citizenship or a declaration to become such on the part of the locator was essential, and, notwithstanding such objection, the court refused
67 to give the same; to which defendant duly excepted. The court refused to give instruction No. 9; to which defendant duly objected, for the reason that the filing of the papers mentioned in said instruction are made conditions precedent by the laws of this Territory to any foreign incorportion doing or transacting business in this Territory or holding or acquiring property in this Territory; but the court refused to give the same; to which defendant excepted. All of which exceptions were taken at the time the instructions were given and before the case was submitted to the jury.

Specification of Errors in which Evidence is Insufficient to Justify the Verdict.

The evidence is insufficient, in this—

1. Because it fails to show that the parties who claim to have located the Garfield Lode claim were citizens of the United States or had ever declared their intentions to become such.

2. Because the proof shows that the work necessary to represent said claim for the year 1882 had not been done.

68 *Errors of Law.*

The court erred in overruling defendant's demurrer, because the complaint did not state facts sufficient to constitute a cause of action, in this, to wit, the claim being unpatented land the complaint should set out every fact necessary in order to show that it was entitled to hold and possess the land under the laws of the United States.

The court erred in admitting in evidence copy of certificate of incorporation of plaintiff, for the reason that the original was not accounted for, for the reason that the same were not properly authenticated, in this, the person who assumes to take the acknowledgement to the same does not attest the same with a seal and no authentication appears thereto that he was qualified to take acknowledgements.

The court erred in admitting copies of the several conveyances under which plaintiff claimed title, for the reason that the
69 original were the best evidence and they were not accounted for.

The court erred in admitting in evidence copy of location of the

Garfield lode, for the reason that the original was not accounted for, and for the further reason that the same was too indefinite and did not contain such a description as required by law, and because the same did not refer to such natural objects or permanent monuments as would identify the claim.

The court erred in refusing to allow defendant to ask of a witness the following question: "From the examination you made of the discovery shaft in 1881 and in June, July, and August, 1882, are you able to state whether you would have known it if any work had been done in June, 1882, in said shaft?" for the reason that the question was competent and was one means of showing that no work had been done on the shaft during that time.

The court erred in giving instruction No. 1, for the reason that the location notice under which plaintiff claimed was invalid,
70 because it contained no sufficient description and because there was no evidence of a location made by any proper person, and because the court in said instruction assumes that such location is not questioned or put in issue by the pleadings and so states to the jury.

The court erred in giving instruction No. 3, for the reason that it requires defendant to prove a forfeiture of plaintiff's title. When the pleadings put title in issue the plaintiff should be required to first show title and valid location.

The court erred in giving instruction No. 4, for the reason that plaintiff could not acquire or hold property until it had complied with the laws of the Territory respecting incorporations, etc.

The court erred in giving instruction No. 4½, because the court permits a recovery without proof of the compliance by plaintiff with the conditions precedent required by the laws of this Territory, namely, filing in the proper offices of its certificate of incorporation.

71 The court erred in refusing to give instruction 7 asked by defendant, for the reason that the mining claim in controversy was unpatented land, and before the plaintiff was entitled to recover it was incumbent on it to show everything that was essential to show a valid location, and, among others, citizenship or a declaration to become such was essential upon the part of the locator.

The court erred in refusing to give instruction No. 9 asked for by defendant, for the reason that the filing of the papers mentioned in said instruction were essential to authorize plaintiff to acquire or hold said property.

The foregoing statement, on motion for a new trial, is correct.

March 27, 1884.

D. S. WADE, *Judge.*

Endorsed: "Service of copy acknowledged Feb'y 19, 1884. Sanders & Cullen, plaintiff's attorneys.

72 And thereupon, under the testimony and instructions of the court, the cause was submitted to the jury, who, after due deliberation thereon, returned into court the following verdict:

GARFIELD MINING & MILLING COMPANY, Plaintiff,

vs.

AUGE O. HAMMER *et al.*, Defendants.

" We, the jury in the above-entitled action, find for the plaintiff.
" A. F. BURNS, *Foreman.*"

Endorsed : " Filed Dec. 19, 1883."

And afterwards, to wit, on the 29th day of December, 1883, the said defendant filed herein his notice of motion for a new trial, of which said notice of motion, in words and figures, the following is a copy, to wit :

73 *Notice of Motion.*

Title of cause. Title of court.

And now comes Auge O. Hammer, one of the defendants herein, and gives notice of his intention to move for a new trial in this action, and designates as the grounds upon which said motion will be made the following, to wit :

First. Irregularities in the proceedings of the court, by which this defendant was prevented from having a fair trial, in that the said cause was tried as to this defendant while a demurrer to plaintiff's complaint was still pending.

Second. Accident and surprise, which ordinary prudence could not have guarded against.

Third. Newly discovered evidence material to this defendant, as shown by the affidavits filed herein.

Fourth. Insufficiency of the evidence to justify the verdict, decisions, and judgment.

Fifth. Errors of law occurring at the trial and excepted to by this defendant. The said motion will be made upon affidavits and a statement of the case.

74 E. W. & J. K. TOOLE,
Att'ys for Def't Hammer.

To the above-named plaintiff and Sanders & Cullen, its attorneys.

" Service of a copy accepted this 29th day of December, A. D. 1883.
" SANDERS & CULLEN,
" Att'ys for Plaintiff."

And on the same day defendant filed his motion for new trial as follows, viz :

Title of cause. Title of court.

Now comes the defendant and moves the court for a new trial herein. This motion is based upon the record, pleadings, statement, bill of exceptions, affidavits, and proceedings in the above cause.

E. W. & J. K. TOOLE,
Defendant's Attorney.

75 And on the 4th day of January, 1884, the following affidavit of Otto Albrecht in support of the foregoing motion for new trial was filed by defendant Hammer, to wit:

Affidavit of Otto Albrecht.

Title of cause. Title of court.

Otto Albrecht and Emil Albrecht, being first duly sworn, each for himself and not one for the other, deposes and says that he is acquainted with Thomas McDonald, a witness on the part of the plaintiff in this case, who, as affiants are informed and believe, is the person claimed to have represented the property in controversy in this case in 1882; that on the second day of July, A. D. 1883, and on the Garfield mining claim, and within about one hundred feet of the discovery shaft on said claim, the said Thomas McDonald said to us and in our presence that he had not performed but two days' work on the Garfield mining claim in 1882, and that such work was done in the discovery shaft.

OTTO ALBRECHT.
76 EMIL ALBRECHT.

Subscribed and sworn to before me this 24th day of December, 1883.

[NOTARIAL SEAL.] JOSEPH K. TOOLE,
Notary Public.

Endorsed: "Service of copy duly made. Sanders & Cullen, plaintiff's attorney-."

And on the same day defendant filed herein in support of said motion the affidavit of defendant Hammer as follows, viz:

Affidavit of A. O. Hammer.

Title of cause. Title of court.

Auge O. Hammer makes oath and says that he is defendant herein; that since the trial of this cause he has discovered new evidence material to his defence that he could not with reasonable diligence have discovered or produced upon the trial; that affiant did not know that plaintiff would undertake to prove that work
77 was done sufficient to represent the property in dispute for 1882, but the only information which affiant could obtain was that the plaintiff would prove an official survey thereof in 1882, which would be claimed to be sufficient as representation; that, to the great surprise of this affiant, the said plaintiff placed upon the stand one Thos. McDonald, who claimed to have done the necessary representation on said property in 1882, and who was the only witness who claimed to have done any work thereon in 1882, and which said work of McDonald was the only work available for the purposes

of representation proven upon the trial; that he had no acquaintance with said McDonald previous to the trial of this case, and did not know and had no reason to believe that he would be a witness on said trial to prove representation; that since the trial of this cause affiant has been informed and verily believes that if a new trial is had herein he can prove by Otto Albrecht and Emil Albrecht that in conversation between them and the said witness,
78 McDonald, at the Garfield mine, on the 2nd day of July, 1883, said witness, McDonald, said that he did not perform but two days' work on said Garfield mine in 1882, and that such work was done in the discovery shaft; all of which affiant is ready to make appear.

And further affiant says not.

AUGE O. HAMMER.

Subscribed and sworn to before me this 24th day of December, 1883.

JOS. K. TOOLE,
Notary Public, M. T.

Service of copy duly made.

SANDERS & CULLEN,
Pl'ff's Attorneys.

And on the first day of February, A. D. 1884, judgment was duly rendered and entered on the verdict in this cause in the words and figures following, to wit:

79 *Judgment on Verdict.*

MONTANA TERRITORY, *Lewis & Clarke County:*

In District Court, 3rd Judicial District.

THE GARFIELD MINING AND MILLING COMPANY
vs.
AUGE O. HAMMER, JOHN KINNA, and LUCIEN W. BLISS.

This action came regularly on for trial on the — day of December, A. D. 1883, that being one of the days of court of the November term, A. D. 1883, upon the complaint of plaintiff, the answer of the defendant, Auge O. Hammer, and the replication of the plaintiff thereto, the parties appearing by their respective attorneys. A jury of twelve persons were regularly impaneled and sworn to try said action; witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the argument of counsel, and the instructions of the court, the jury retired to con-
80 sider of their verdict, and subsequently returned into court on the 19th day of December, 1883, and, being called, answered to their names and say they find a verdict in favor of the plaintiff, which said verdict is duly entered and filed in the records of said court.

Wherefore, by virtue of the law and by reason of the premises, it is ordered, adjudged, and decreed that the plaintiff have judgment as prayed for in its complaint herein against the defendant, Auge O. Hammer, and that all adverse claim of the said defendant and of all persons claiming or to claim the premises in said complaint described or any part thereof through or under said defendant are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff is, and it is hereby declared and adjudged to be, the true and lawful owner of the land described in the complaint and every part and parcel thereof, and that the title thereto is adjudged to be quieted against all claims, demands, or pretensions of
81 the said defendant; and said defendant is hereby perpetually estopped from setting up any claim thereto or any part thereof. Said premises are more particularly bounded and described as follows, to wit:

Lot numbered ninety-six (96) of township numbered eight (8) of range numbered five (5) west of the principal meridian of the Territory of Montana.

And it is hereby further ordered and adjudged that plaintiff do have and recover its costs, hereby taxed at — dollars, against the said defendant, Auge O. Hammer.

Judgm't ren'd Feb. 1, 1884.

D. S. WADE, *Judge.*

And on the 25th day of March, A. D. 1884, the said plaintiff filed herein the affidavit of the witness, Thomas McDonald, — which said affidavit, in words and figures, the following is a copy, to wit:

Affidavit of Thomas McDonald.

Title of cause. Title of court.

Thomas McDonald, being first duly sworn, says that he is
82 the Thomas McDonald who was a witness for the plaintiff upon the trial of the above-entitled action; that he has heard read the affidavit of Otto Albrecht and Emil Albrecht on motion for new trial in said cause; that he first knew said Albrechts when they came to work for defendant on the Garfield lode, being the same lode in controversy in this action; that said witnesses came to work on said mining claim on Sunday, the 1st day of July, A. D. 1883; that this affiant was there at said mining claim and then and there had a conversation with said witnesses, in which he told them that the said Garfield lode had been fully represented for the year A. D. 1882; that on the 2nd day of July, 1883, this affiant had no conversation of any kind or character with said alleged witnesses, and did not see them on that day except in the presence of John T. Grayson; that affiant, knowing that it was likely there would be litigation over the title to said property, preserved a written memorandum of what took place relative to said mining claim, and from said memo-
83 randums and from his own recollection is able to swear positively that no such conversation as is detailed in said affida-

vit took place on the 2nd day of July, 1883, or at any other time; and affiant repeatedly told said witnesses that said lode had been represented for the year A. D. 1882; that said witnesses continued to work for said defendant on said mining claim, sinking a shaft, which shaft was between discovery shaft and plaintiff's main shaft on said lode, and continued so to work until about the 20th of August, 1883, and that at no time did he tell them that he had done two days' work or any other number of days' work on said mine in the year A. D. 1882; and further affiant saith not.

THOMAS McDONALD.

Subscribed and sworn to before me this 17th day of March, A. D. 1884.

W. E. CULLEN,
Notary Public, M. T.

84 And on the — day of March, A. D. 1884, that being one of the term days of the March, 1884, term of said district court, this cause was brought on to be heard before the court on defendant's motion and the affidavits in support thereof for a new trial therein; whereupon it was considered and ordered by the court that said motion be denied and overruled; to which ruling of the court in overruling the motion for new trial and to the rendition and entry of judgment & decree in said cause the defendant Hammer, by his counsel, then & there duly excepted and asks that this his exception to said proceedings be signed, sealed, and made a part of the record in said cause, which is done accordingly.

And on the 16th day of April, A. D. 1884, the said defendant filed in said cause his notice of appeal, — of which, with the endorsement of service thereon, is as follows, viz:

85 *Notice of Appeal.*

In the District Court of the 3d Judicial District of the Territory of Montana in & for the Co. of Lewis & Clarke.

THE GARFIELD MINING AND MILLING COMPANY
vs.
AUGE O. HAMMER, JOHN KINNA, & LUCIEN W. BLISS.

You will please take notice that the defendant, Auge O. Hammer, in the above-entitled action hereby appeals to the supreme court of this Territory from the order overruling the defendant's motion for new trial and from the judgment decreeing title in plaintiff of the property in controversy therein made and entered in the said district court on the 1st day of Feb'y, A. D. 1884, in favor of the plaintiff in said action and against said defendant Hammer, & from the whole thereof.

Yours, &c., E. W. & J. K. TOOLE,
Attorneys for Defendant Hammer.

Dated 15 April, 1884.

To the clerk of said dist. court & to Messrs. Sanders & Cullen, att'ys for pl'ff.

Service of a copy of the within notice accepted this 16th day of April, 1884.

SANDERS & CULLEN,
Plaintiff's Attorneys.

86 And on the same day the defendant Hammer filed herein his undertaking on appeal as follows, viz:

Bond on Appeal.

Title of cause. Title of court.

Whereas the defendant, Auge O. Hammer, in the above-entitled action is about to appeal to the supreme court of the Territory of Montana from a judgment entered against him, in said action in the said district court, in favor of the plaintiff in said action, on the 1st day of Feb'y, A. D. 1884, and from the order, overruling defendant's motion for new trial, decreeing the ownership and title of certain mining property in the complaint in said action described to belong to said plaintiff:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and householders of the county of Lewis and Clarke and Territory of Montana, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages & costs which
87 may be awarded against him on the appeal or on a dismissal thereof not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

Dated the 15th day of April, A. D. 1884.

AUGE O. HAMMER. [SEAL.]
MARTIN M. HOLTER. [SEAL.]
ANTON M. HOLTER. [SEAL.]

TERRITORY OF MONTANA, } *ss:*
County of Lewis & Clarke, }

Martin M. Holter and Anton M. Holter, whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself says that he is worth the sum in the said undertaking specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

MARTIN M. HOLTER.
ANTON M. HOLTER.

Subscribed & sworn to before me this 15th day of April, A. D. 1884.

JOSEPH K. TOOLE,
Notary Public.

88 In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

THE GARFIELD MINING AND MILLING COMPANY, Respondent,
vs.
AUGE O. HAMMER *et al.*, Appellant-.

I, Alex. H. Beattie, clerk of said district court, do hereby certify that the foregoing eighty-seven pages, numbered from 1 to 87, inclusive, contain a full, true, & correct transcript of certain pleadings, records, & proceedings filed, made, and had in the above-entitled cause in said court as the same remain on file and of record in my office.

Witness my hand & official seal hereunto affixed the 12th day of July, A. D. 1884.

{ Seal of the Third Judicial District Court, Lewis and Clarke County, Montana Territory. }

ALEX. H. BEATTIE, *Clerk*,
By I. R. ALDEN, *Deputy Clerk*.

89 In Supreme Court of Montana Territory. August Term, 1885.

Be it remembered that in the present term of January, A. D. 1885, the cause between the Garfield Mining and Milling Co., respondent, and Auge O. Hammer *et al.*, appellants, was brought into the supreme court of Montana Territory by virtue of an appeal, and was argued by counsel; thereupon the same was taken under advisement by the court.

And afterwards, to wit, in the August term, A. D. 1885, of said supreme court, said cause came on for decision on appeal.

Whereupon the court delivered its opinion in writing in the cause, of which the following is a copy, to wit:

90 In Supreme Court of Montana Territory. August Term, 1885.

GARFIELD MINING & MILLING COMPANY, Respondent,
vs.
AUGE O. HAMMER, JOHN KINNA, and LUCIEN W. BLISS, Appellants.

GALBRAITH, *J.*, delivered the opinion:

This is an appeal from an order overruling a motion for a new trial. The action was to quiet title. A trial by a jury was had between the respondent and the appellant Hammer. The pleadings, so far as they were concerned, were in substance as follows: The complaint alleged that the respondent "is a body corporate and politic" organized under the laws of the State of New York for the purpose of mining and milling ores containing the preci-us metals in Montana Territory, and that it has complied with the laws of that Territory in relation to foreign corporations; that it is the
91 owner of a certain quartz lode mining claim situate in Vaughan (unorganized) mining district, in the county of

Lewis & Clarke and Territory of Montana, called the Garfield lode or mining claim; that the respondent is now in the possession of the above claim, and that plaintiff and its predecessors in interest have been ever since the discovery and location of said claim in possession of the same and entitled to be so in possession thereof; that the appellant Hammer, on or about the 1st day of January, 1883, assumed to enter upon said premises and to relocate the same and had the relocation recorded in the county of Lewis & Clarke as the Kinna lode, and thereby now claims an interest therein and the possession thereof adversely to the respondent, and has made application for a patent to the premises under the name of the Kinna lode; that the claim of the appellant is without any right whatever; that the respondent has filed its adverse claim in the land office, whereby proceedings will be stayed till the final determination of the right to the premises.

The answer denies that the respondent ever was or is a body politic and corporate or that it has duly complied with the laws
92 of Montana Territory relative to foreign corporations; denies that the respondent is the owner of the premises, or that it is now or ever was in the possession thereof, or that it or its predecessors in interest have been ever since the discovery or location thereof in possession of the same or are or were entitled to such possession, or that he assumed to relocate the said premises or caused any location thereof to be recorded as the Kinna lode, or that his claim is without right, or that he has not any estate, title, interest, or right to the possession of said premises.

The appellant then founds his claim to the premises by virtue of a location made on the 1st day of January, 1883, by the name of the Kinna lode, the premises being then vacant mineral lands of the United States, such location having been made in full compliance with the laws of Congress and Montana Territory by one Wolfe; that

on the — day of January, 1883, the appellant purchased the
93 premises from Wolfe, and ever since the first day of January, 1883, the appellant and his predecessors in interest have been the owners of and held possession and duly represented said Kinna lode, and ever since said time this defendant has been and now is entitled to the possession of the same; that whatever claim the respondent ever had (if any) to said premises was forfeited prior to 1st January, 1883.

The reply denied all the affirmative allegations set forth in the answer. Upon the trial the court instructed the jury as follows:

"If you beleive from the evidence in the case that prior to the 31st day of December, A. D. 1882, the plaintiff was in the quiet and undisputed possession of the premises designated in the complaint as the Garfield lode, the validity of the original location of which is not questioned in the pleadings or testimony claimed by the defendant as the Kinna lode; that the boundaries of said claim were

so marked upon the surface as to be readily traced, and that
94 theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock in place bearing gold, silver, or other precious metals, then this constitutes a *prima facie* case for the plaintiffs, which can only be overcome by the defendant

by proof of subsequent abandonment or forfeiture or other divestiture and the acquisition of a better right or title by the defendant."

The above statement of the pleadings shows that the respondent claimed its right to a decree, that the title and right to the possession of the premises be adjudged to be in it upon the allegations of ownership, possession, and right of possession thereto, and that these allegations are denied by the answer. The allegation of forfeiture in the answer is consistent with these denials. The respondent does not claim the premises by virtue of a patent from the United States, but by virtue of a location made by its predecessors in interest. Now, although the courts of this Territory, in determin-

95 ing the title to mining claims where there is a dispute in relation thereto in the land office, have adopted the forms of action by which title to land is tried, which may be either by the action of ejectment or to quiet title, yet the real question to be determined is who is entitled to the patent from the United States Government to the mining claim in controversy, or, in other words, who has become the purchaser of the mining — and divested the title of the Government thereto by complying with the requirements of the law of Congress relative to acquiring title to mineral lands? The right to the possession of a mining claim comes only from a valid location; consequently if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by marking on the ground, recording, and doing whatever is required for that purposes by the acts of Congress and the local laws and regulations.

Belk *vs.* Meagher, 104 U. S., p. 279.

96 Therefore when the respondent's claim of ownership and right to the possession were put in issue by the answer it devolved upon the respondent to show affirmatively upon the trial that it had complied fully with all the requirements of the act of Congress and the local rules and regulations relative to the location of mining claims—that is, that it had made a valid location. The above instruction and others of the same tenor took away from the jury the question of the validity of the original location made by the predecessors in interest of the respondent, and so far as the pleadings were concerned were clearly erroneous. The answer did properly put in issue the validity of the respondent's location. Were these instructions prejudicial to the appellants? The record shows that the appellant did not introduce any evidence whatever tending to invalidate the respondent's location. The only evidence introduced by the appellant affecting the respondent's title

97 was simply relative to the question of forfeiture. The uncontradicted evidence introduced by the respondent upon the trial relative to the location was as follows: "That the boundaries of said claim *was* clearly marked upon the surface by stakes set at the corners thereof and elsewhere on said boundaries, and that said boundaries could be readily traced; that there was discovered

thereon a lode of quartz rock in place bearing gold and silver, such vein having at least one well-defined wall."

As to the question of citizenship, the oath attached to the certified copy of the location notice of the Garfield lode by one of the locators states that he and his colocator are citizens of the United States over the age of twenty-one years."

There is nothing in the record indicating that the locators and predecessors in interest of the respondent were not citizens of the United States or had not declared their intention to become such; and being natural persons they will be presumed to be
98 citizens of the United States until the contrary appears.

In Cox *vs.* Gulick, 5 Holst, N. Y., referred to in Phillips on Ev., Vol. 1, page 556, Ford, J,. held, in substance, that "every man is presumed to be a citizen till the contrary be shown." In People *ex rel.* Smith *vs.* Pease, 27 N. Y., p. 45, which was an action in the nature of a *quo warranto* to try title to an office, Davis, J., says: "So with that part of the charge correct in relation to the witness Rivenot, who testified that he was born in France and had voted, and there was no evidence tending to show that he had ever been naturalized. The judge in that case charged that the legal presumption was that he had been naturalized. No suggestion was made or evidence given when the witness was on the stand that he had not been naturalized. He had voted, and the presumption was that he had voted legally. It was not for the court to say, as matter of law, that the vote was illegal." The citizenship of the respondent
99 is established by the fact that it is a corporation formed under the laws of the State of New York. We think that the presumption that the locators and predecessors in interest of the respondent were citizens will protect its title to the property until it is affirmatively made to appear that they were not citizens or had not declared their intention to become such.

The recorded notice of location was, in our opinion, sufficient. The statutes of the United States require that this record should contain three things, which are requisite to its validity, viz., the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. It is admitted by the appellant that this record does contain the first two requisites and it is only claimed that it is defective in that it does not refer to some natural object or permanent monument which will identify the claim. It describes
100 the location by metes and bounds as "commencing at discovery stake, running fifty feet east to centre stake, then three hundred feet north to stake 'A,' thence fifteen hundred feet west to stake 'B,' thence six hundred feet south to stake 'C,' and fifteen hundred feet east to stake 'D,' and three hundred feet north to place of commencement." It then states that this lode is located about fifteen hundred feet south of Vaughn's Little Jennie mine, described and located on the 4th of July, 1880. There was no objection made that the notice of location of the Garfield lode was not filed within twenty days from the discovery thereof, as required by the

local law. There is nothing in the evidence indicating that the Little Jennie mine was not a well-known valid location at the time of the location of the Garfield lode. It will be presumed to be a well-known natural object or permanent monmument until the contrary appears, where a location is described by metes and
101 bounds as in this notice, and is further described as being fifteen hundred feet south from a well-known quartz location, and there is nothing in the evidence to contradict such a description, distance, and direction. We think the ground claimed to be sufficiently identified to meet the above requirements of the act of Congress. Besides, we have already said in substance that we cannot by merely looking at the notice itself say, without evidence to the contrary, that the claim is not properly identified.

Wade, C. J., in Russell *vs.* Chumasero, 4 Mont., p. 309:

"No objection having been made that the notice of location of the Garfield lode was not filed within twenty days after the discovery thereof, as required by the local law, such objection, if any, was waived. As will be seen hereafter, the certified copy of the declaratory statement or notice of location, under oath, of the Garfield lode was properly admitted in evidence. Every requisite, therefore, to a valid location of the Garfield lode was established by the respondent.
102 No evidence was introduced by the appellant tending to invalidate the respondent's location. The only evidence offered by him was in relation to the question of forfeiture, which was upon the ground that the amount of work required by law was not done for the year 1882. The respondent's location was not questioned, and forfeiture was the only issue made upon the trial. The instruction complained of was therefore not prejudicial to the appellant. The plea of forfeiture was properly made by the appellant in his answer, and this being the only issue made upon the trial the following instruction by the court below was correct except as to the pleadings, which we have said before was not prejudicial. The right of the defendant to recover in this case depends upon the forfeiture, which he alleges took place, of plaintiff's right to the premises by reason of the failure of plaintiff to expend in labor and improvements upon the said Garfield lode the sum of one hundred dollars
103 during the year 1882. The plaintiff being in possession under a location, the validity of which is not questioned, it became the duty of defendant to prove by a clear preponderance of testimony that there was a forfeiture, and unless they have so proved the same to your satisfaction your verdict should be for the plaintiff."

The appellant claims that the court erred in refusing to grant a new trial on the ground of newly discovered evidence; which was that the witness McDonald, who testified to having done the work constituting the representation of the Garfield lode for 1882, had stated out of court and before the trial, in the presence and hearing of two witnesses, that "he did not perform but two days' work on said Garfield mine for 1882." This newly discovered evidence could only affect the credibility of the witness McDonald. There is also an affidavit by the witness McDonald contradicting the affidavit of these

two witnesses and asserting that he never made any such statement.

This newly discovered testimony is cumulative. The record
104 shows that the witnesses Orth and Arnold, called by the appellant, testified upon the trial to substantially the same thing as is stated in the affidavit relating to the newly discovered evidence. It is by no means clear that this newly discovered evidence would have changed the result of the trial.

In Levetsky *vs.* Johnson, 35 Cal., 41, it is said: "A party is presumed to know when he is ready for trial upon the main essential issues involved, and he cannot be allowed a new trial after having submitted his case upon such testimony as he thought proper to introduce in support of those issues of fact by a showing that he had subsequently discovered additional pertinent evidence upon the same issue, unless it is clear that such evidence would have changed the result, and that the strictest diligence would not have enabled him to procure the same on the trial."

The granting of a new trial rests in the sound discretion of the court, and in refusing a new trial under the above circum-
105 stances we do not think the court abused its discretion.

Caruthers *et al. vs.* Pemberton *et al.*, 1 Mont., 111: It is claimed that the court erred in admitting certified copies of the certificate of incorporation of the respondent; of the declaratory statement under oath of the locators of the Garfield lode, and of the deeds showing title from them and the other predecessors in interest to the respondent. In the case of McKinstry *vs.* Clark & Cameron, 4 Mont., 370, a question arose as to the admissibility of a certified copy of a declaratory statement, and in the opinion of the court it was said: "The law requires the discoverer to make and file in the office of the recorder his declaratory statement to be by him recorded." And section 384, article 4, fifth division of the general laws, is as follows, to wit: "Copies of all papers filed in the office of the recorder of deeds, and transcripts from the books of record kept therein, certified by him under the seal of his office, shall
106 be *prima facie* evidence in all cases." And section 609, civil code: "There can be no evidence of the contents of a writing other than the writing itself, except in the following cases: * * * Paragraph 4. When the original has been recorded and a certified copy is made evidence by this code or other statute;" and, in further explanation, the second clause of the fifth subdivision provides that in the cases mentioned in subdivisions 3 and 4 a copy of the original or a certified copy must be produced. Taking all these statutes together, the correct conclusion is that either the one or the other is competent evidence to offer; and it was not error in the court below to admit the certified copy of location notice in evidence without first accounting for the original. The foregoing is also conclusive as to the second specification of error. By reference to the above case it will be seen that the second specification of error was "admitting a certified copy of deed from Ford to Cameron." The certified copy of the deed was
107 also, therefore, properly admitted. The above language is also applicable to the certified copies of the certificate of re-

spondent's incorporation. It is objected that the court erred in refusing the appellant to ask of a witness the following question: "From the examination you made of the discovery shaft in 1881 and in June, July, and August, 1882, are you able to state whether you would have known it if any work had been done in said shaft?"

The answer to this question would simply have been an opinion by the witness as to whether or not work had been done in the shaft in June, 1882. The witness does not appear to have been a mining expert, and it was only competent to show by him the facts, such as the condition and appearance of the shaft at the respective times stated, and it was for the jury to determine from such facts whether or not work had been done.

108 The only other objection insisted upon is that the respondent had not filed in the proper office its certificate of incorporation. The question was considered by this court in the case of King *vs.* The National Mining and Exploring Company, 4 Mont., 1, where it was determined that under sections 46 & 47, p. 419, of Codified Statutes, "that foreign corporations are * * * not prohibited from doing business in this Territory." We are satisfied with that decision, and it is an answer to the above objection. We see no error in this record which is prejudicial to the appellant.

The judgment is affirmed with costs.

Thereupon judgment on appeal was entered in this cause as follows:

109 In Supreme Court, Montana Territory. August Term, 1885.

GARFIELD MINING & MILLING CO., Resp't,

vs.

AUGE O. HAMMER *et al.*, App'l'ts.

This cause coming on to be heard before this supreme court on the transcript of the record of the court below filed herein, the same was argued by counsel for the respective parties.

Whereupon it is now here ordered and adjudged by the court that the judgment and decree of the court below entered in said cause on the 1st day of February, A. D. 1884, be, and the same is hereby, affirmed with costs; and it is further ordered that said respondent recover against said appellants — dollars for its costs herein expended and have execution therefor.

15th August, 1885.

110 And thereupon said appellant sued out a writ of error to remove said cause to the Supreme Court of the United States and caused a citation to issue herein, which was duly served, and an undertaking, which is as follows, viz:

Know all men by these presents that we, Auge O. Hammer, as principal, and Anton M. Holter and Martin M. Holter, as sureties, are held and firmly bound unto the Garfield Mining and Milling

Company in the full and just sum of five hundred dollars, to be paid to the said Garfield Mining and Milling Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17 day of Aug., A. D. 1885.

Whereas lately, at a term of the supreme court of the Terri-
111 tory of Montana, in a suit pending in said court between the Garfield Mining and Milling Company, plaintiff, and Auge O. Hammer *et als.*, defendants, there was rendered a final judgment in favor of the plaintiff and against the said defendants for more than the sum of five thousand dollars, exclusive of costs; and the said defendants having sued out a writ of error from the Supreme Court of the United States to reverse the said judgment, and lodged a copy of said writ in the clerk's office of the supreme court of Montana Territory for inspection, and a citation, directed to the said plaintiff, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, and shall pay or cause to be paid such sum as may be awarded against him by reason of the suing out of said writ of error, then the
112 above obligation to be void; else to remain in full force and virtue.

AUGE O. HAMMER. [SEAL.]
ANTON M. HOLTER. [SEAL.]
MARTIN M. HOLTER. [SEAL.]

In presence of—
WM. WALLACE, JR.

Approved:
D. S. WADE,
Chief Justice.

And afterwards the said appellant filed herein an affidavit of value of the amount in controversy in said cause in the following words & figures, to wit:

Affidavit of Value.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

AUGE O. HAMMER *et al.*, Plaintiffs in Error,
vs.
THE GARFIELD MINING AND MILLING COMPANY, Defendant in Error.

Auge O. Hammer, being duly sworn, says that he is the plaintiff in error in the above-entitled action; that said action was

113 originally instituted in the district court of the 3d judicial district of Lewis & Clarke county, Montana Territory, to determine the title and right of possession of, in, and to a certain quartz mining claim situate in the county and Territory aforesaid, and known and called as the "Garfield lode," which said lode is particularly described in plaintiff's complaint in said action; that affiant is thoroughly familiar with said property and conversant with the value thereof, and that the same is well worth and of the value of ten thousand ($10,000.00) dollars.

AUGE O. HAMMER.

Subscribed & sworn to before me this 15th day of August, 1885.
[NOTARIAL SEAL.] WM. WALLACE, JR.,
Notary Public, Montana Territory.

114 In Supreme Court, Montana Territory.

AUGE O. HAMMER *et al.*, Pl'ffs in Error,
vs.
THE GARFIELD MINING AND MILLING COMPANY, Def't in Error.

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing one hundred & thirteen pages, numbered from 1 to 113, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled cause in said court as the same appear on file and of record in my office.

In witness whereof I have hereunto set my hand & affixed my official seal this 19th day of September, A. D. 1885.

[Seal Supreme Court, Montana Territory.]

I. R. ALDEN, *Clerk.*

115 UNITED STATES OF AMERICA:

In Supreme Court.

GARFIELD MINING AND MILLING COMPANY, Def'ts in Error,
vs.
AUG. O. HAMMER *et al.*, Pl'ffs in Error.

To the Garfield Mining and Milling Company and Messrs. Sanders & Cullen, its attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein Aug. O. Hammer is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Decius S. Wade, chief justice of the supreme court of Montana Territory, the 1st day of April, A. D. 1885.

[Seal Supreme Court, Montana Territory.]

DECIUS S. WADE,
Chief Justice.

116 Service of foregoing citation accepted & copy waived the 7th day of April, 1885.

SANDERS & CULLEN,
Att'ys for Defendant in Error.

117 [Endorsed:] Original. In Supreme Court of the United States. A. O. Hammer *et al.*, pl'ffs in error, *vs.* The Garfield Mining and Milling Company, def't in error. Citation. Filed April 7th, 1885. I. R. Alden, clerk. Filed Aug. 15, 1885. I. R. Alden, clerk.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory, before you or some of you, in a cause between The Garfield Mining and Milling Company, plaintiff and respondent, and Auge O. Hammer *et al.*, defendants and appellants, a manifest error hath happened, to the great damage of the said Auge O. Hammer, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you that, if judgment be therein given, *that* then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of
119 right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of March, A. D. 1885.

[Seal Supreme Court, Montana Territory.]

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by—

DECIUS S. WADE,
Chief Justice.

120 [Endorsed:] In Supreme Court of the United States. A. O. Hammer *et al.* pl'ffs in error, *vs.* The Garfield Mining and Milling Company, def't in error. Writ of error. Filed March 9, 1885. I. R. Alden, clerk. Filed Aug. 15, 1885. I. R. Alden, cl'k.

Endorsed on cover: Montana Territory supreme court. No. 207. Auge O. Hammer, plaintiff in error, *vs.* The Garfield Mining and Milling Company. Filed November 21, 1885.

FEB 12 1889
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 207.

AUGE O. HAMMER, PLAINTIFF IN ERROR,

vs.

THE GARFIELD MINING AND MILLING COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

EDWIN W. TOOLE &
JOSEPH K. TOOLE,
Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 207.

AUGE O. HAMMER, PLAINTIFF IN ERROR,

vs.

THE GARFIELD MINING AND MILLING COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

STATEMENT.

This is an appeal from an order overruling a motion for a new trial. The action was to quiet title. A trial by jury was had between the respondent and the appellant, Hammer. The pleadings, so far as they were concerned, were in substance as follows: The complaint alleged that the respondent "is a body corporate and politic," organized under the laws of the State of New York for the purpose of mining and milling ore containing the precious metals, in Montana Territory, and that it has complied with the laws of that Territory in relation to foreign corporations; that it is the owner of a certain quartz lode mining claim situate in Vaughan (unorganized) mining district, in the county of Lewis and Clarke and Territory of Montana, called the Garfield lode or

mining claim; that the respondent is now in the possession of the above claim, and that plaintiff and its predecessors in interest have been, ever since the discovery and location of said claim, in possession of the same and entitled to be so in possession thereof; that the appellant, Hammer, on or about the 1st day of January, 1883, assumed to enter upon said premises and to relocate the same, and had the relocation recorded in the county of Lewis and Clarke as the Kinna lode, and thereby now claims an interest therein and the possession thereof adversely to the respondent, and has made application for a patent to the premises under the name of the Kinna lode; that the claim of the appellant is without any right whatever; that the respondent has filed its adverse claim in the land office, whereby proceedings will be stayed till the final determination of the right to the premises.

The answer denies that the respondent ever was or is a body politic and corporate, or that it has duly complied with the laws of Montana Territory relative to foreign corporations; denies that the respondent is the owner of the premises, or that it is now or ever was in possession thereof or that it or its predecessors in interest have been ever since the discovery or location thereof in possession of the same, or are or were entitled to such possession, or that he assumed to relocate the said premises or caused any location thereof to be recorded as the Kinna lode, or that his claim is without right, or that he has not any estate, title, interest, or right to the possession of said premises.

The appellant then founds his claim to the premises by virtue of a location made on the 1st day of January, 1883, by the name of the Kinna lode, the premises being then vacant mineral lands of the United States, such location having been made in full compliance with the laws of Congress and Montana Territory by one Wolfe; that on the — day of January, 1883, the appellant purchased the premises from Wolfe, and ever since the first day of January, 1883, the appellant and his predecessors in interest have been the

owners of and held possession and duly represented said Kinna lode, and ever since said time this defendant has been and now is entitled to the possession of the same; that whatever claim the respondent ever had (if any) to said premises was forfeited prior to 1st January, 1883.

The reply denied all the affirmative allegations set forth in the answer.

SPECIFICATION OF ERRORS IN WHICH EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT.

The evidence is insufficient in this—

1. Because it fails to show that the parties who claim to have located the Garfield lode claim were citizens of the United States or had ever declared their intentions to become such.

2. Because the proof shows that the work necessary to represent said claim for the year 1882 had not been done.

ERRORS OF LAW.

The court erred in overruling defendant's demurrer because the complaint did not state facts sufficient to constitute a cause of action, in this, to wit, the claim being unpatented land the complaint should set out every fact necessary in order to show that it was entitled to hold and possess the land under the laws of the United States.

The court erred in admitting in evidence copy of certificate of incorporation of plaintiff for the reason that the original was not accounted for, for the reason that the same was not properly authenticated, in this, the person who assumes to take the acknowledgment to the same does not attest the same with a seal and no authentication appears thereto that he was qualified to take acknowledgments.

The court erred in admitting copies of the several con-

veyances under which plaintiff claimed title, for the reason that the originals were the best evidence and they were not accounted for.

The court erred in admitting in evidence copy of location of the Garfield lode for the reason that the original was not accounted for, and for the further reason that the same was too indefinite and did not contain such a description as required by law, and because the same did not refer to such natural objects or permanent monuments as would identify the claim.

The court erred in refusing to allow defendant to ask of a witness the following question: "From the examination you made of the discovery shaft in 1881 and in June, July, and August, 1882, are you able to state whether you would have known it if any work had been done, in June, 1882, in said shaft?" for the reason that the question was competent and was one means of showing that no work had been done on the shaft during that time.

The court erred in giving instruction No. 1, for the reason that the location notice under which plaintiff claimed was invalid because it contained no sufficient description and because there was no evidence of a location made by any proper person, and because the court in said instruction assumes that such location is not questioned or put in issue by the pleadings, and so states to the jury.

The court erred in giving instruction No. 3, for the reason that it requires defendant to prove a forfeiture of plaintiff's title. When the pleadings put title in issue the plaintiff should be required to first show title and valid location.

The court erred in giving instruction No. 4, for the reason that plaintiff could not acquire or hold property until it had complied with the laws of the Territory respecting incorporations, etc.

The court erred in giving instruction No. 4½, because the court permits a recovery without proof of the compliance by plaintiff with the conditions precedent required by the laws

of this Territory, namely, filing in the proper offices of its certificate of incorporation.

The court erred in refusing to give instruction No. 7, asked by defendant, for the reason that the mining claim in controversy was unpatented land, and before the plaintiff was entitled to recover it was incumbent on it to show everything that was essential to show a valid location, and, among others, citizenship or a declaration to become such was essential upon the part of the locator.

The court erred in refusing to give instruction No. 9, asked for by defendant, for the reason that the filing of the papers mentioned in said instruction were essential to authorize plaintiff to acquire or hold said property.

ARGUMENT.

I.

In discussing the questions involved in this case we shall present them in the order in which they appear in the record. In doing this we are met at the threshold by a proposition that has been decided by the supreme court of Montana adversely to the position here taken by the plaintiff in error. The principal question relied upon by counsel and discussed by the court in the case to which we refer—King *vs.* Nat'l Mining and Exploring Comp'y—involved the right of a foreign corporation to avail itself of the statute of limitation in this Territory, while the one at bar squarely presents and necessarily involves the right of *such corporations* to do or *transact any kind of business therein whatever* without first filing its charter or certificate of incorporation or a copy thereof with the secretary of the Territory and county recorder of the county, as required by section 46, page 419, Codified Statutes, in force at the time the rights of the respective parties to this action attached. This section of the

statute, in so far as it applies to the point in question, reads as follows:

"That hereafter all mining, manufacturing, and other companies or incorporations, incorporated by the Legislature of any State or Territory of the United States or incorporated under the general laws of incorporation of any State or Territory other than this Territory and incorporated for the purpose of carrying on or doing business of any kind, nature, and description whatever in this Territory, shall, before they proceed to do business under the charter or certificate of incorporation in this Territory, file for record with the secretary of the Territory, and also with the recorder of the county in which they are carrying on business, the charter or certificate of incorporation, duly authenticated, or a copy of said charter or certificate of incorporation."

By this it will be seen that this document becomes an original record in the custody of these officers.

Section 525 also provides that "a copy of any record or document or paper in the custody of a public officer of this Territory or of the United States within this Territory, certified under the official seal, * * * may be read in evidence in an action or proceeding in the courts of this Territory in the like manner and with like effect as the original could be if produced."

Two things, as will be seen, are accomplished by complying with the terms of section 46: 1st, the foreign corporation *acquires* a *right* to *do* and *transact business* in the Territory; 2nd, competent evidence of its existence is furnished in the office of the *secretary* of the *Territory*.

Section 47 of the same statutes is as follows: "That any company or corporation incorporated as in sections (1 to 47) of this act that shall neglect or refuse for the period of thirty days to so file their charter or certificate of incorporation or copy thereof with the *secretary* of the Territory *and* county recorder of the county wherein such business may be carried on shall be deemed guilty of willful negligence

on the part of said company or corporation, and thereafter any person or persons *maintaining* or *prosecuting* any *civil action* in any court of this Territory *against* said *company* or *corporation* so neglecting or refusing to file their charter or certificate of incorporation or copy thereof with the secretary of the Territory and county recorder, as heretofore provided, shall *not* be *held* to *prove* on *trial* the *incorporation* of said company or corporation by the *original charter* or *certificate* of *incorporation* or act of incorporation, but the same may be proved by general reputation."

The fact that this last section applies *solely* to cases wherein the *corporation* is *sued* by *some one* and not to cases in which the corporation is endeavoring to enforce its transactions or assumed rights within the Territory cannot easily escape observation. We might here say in the outset, then, that section 46 is unaffected in any way by section 47, in so far as this action by a foreign corporation against these defendants is concerned. It does not and cannot, by any of the rules of construction or interpretation, be made to apply to it.

We think that we might here invoke the benefit of the provisions of section 46 and rest the case, section 47 being wholly inapplicable to it.

It is conceded in the opinion of the court in the case of King *vs.* The National Mining and Exploring Company, and will not, we assume, be disputed, that section 46 *ex vi termini* is an *inhibition of* or *condition precedent to* a *foreign* corporation doing business in this Territory without complying with its terms—that is to say, it fixes the *specific conditions* upon which a foreign corporation may do business here. The converse of this proposition, under the familiar maxim *expressio unis, exclusio alterius*, necessarily follows, and such corporations are not authorized in doing business in the Territory without first complying with its provisions. But it is contended that section 47 provides a penalty for failing to so comply, and on that account such corporations

are authorized to carry on business as though section 46 had never been enacted.

As we have before seen, section 47 has no application whatever to a case in which the plaintiff is a foreign corporation, and that section 46 is only modified, *if at all, pro tanto* in so far as it affects cases in which other persons are plaintiffs and seeking to secure some claim against it in the courts of this Territory. But, aside from this, how does the case stand? It is clear that a compliance with section 46 of itself accomplishes two objects: 1st, it authorizes a *foreign corporation* to do business here; 2nd, it furnishes in the offices of the secretary and recorder legitimate evidence of its existence. Without such compliance *two* things necessarily follow: First, the corporation is not authorized to do business here; and, second, no evidence of its existence is preserved in the offices mentioned. If, then, it can be said that section 47 is in the nature of a penalty and operated as a repeal to sections 46 and 525, *supra*, to what extent does it so operate? When does it apply and what portion of the section is affected by it? Evidently it applies to cases where the corporation is defendant, and operates solely upon that portion of the section affecting the evidence that may be adduced. It leaves that portion of it with reference to *doing business* in the Territory *untouched* and in no manner affects the entire section, in so far as actions commenced by such corporations are concerned. In such cases it is necessary for it to set out its corporate existence in order to maintain the action, and when it does this it must also show that it has filed the charter or certificate of incorporation. If it does not it fails to show a right to acquire property and bring this suit, and that is all there is about it. It would be perilous to say that the *penalty* or *supposed penalty* applied in a case like this, and that defendants might invoke it by showing by general reputation the facts that plaintiff was bound to allege and if undenied would be taken as true.

Had section 47 not been enacted and suit been instituted to eject a foreign corporation from possession of property taken under our mining laws without complying with section 46, the plaintiff would be required to resort to the laws and records of the State of New York or elsewhere to establish its existence. By the provisions of section 47 these facts may be established by evidence that it is such a corporation by general reputation. Hence, in order to establish the facts that show want of *authority to do business here—i. e.*, that it is a foreign corporation—resort is had in the one case to the records of the foreign State where it was incorporated and in the other to general reputation. Section 47 only says in terms that if a foreign corporation is doing business here, in order to show its want of authority to do so you may prove it is a foreign corporation by general reputation, without producing copies of documentary evidence from foreign States. It would be a very remarkable process of reasoning to say that upon showing the existence of certain facts you establish a want of power, and yet because the same law has *provided* the *character* of *testimony* by which *such facts* may be shown it must be construed in the nature of a penalty, and the consequences resulting from these facts no longer exist, and the power will be upheld. This might be said in every case where an innovation is made upon the general rules of evidence by statutory enactment. Statutes provide how infants may acquire and dispose of property. Yet would it be concluded that because an act provided the particular mode of establishing such infancy, outside the usual course at common law, it therefore authorized them to acquire and dispose of it in a different way than that prescribed? And yet this is the precise question involved here. The question involves the right of plaintiff as a foreign corporation to acquire property and sue for its protection in utter disregard of the statute. And yet it is said that because the means are provided by which you can establish that it is a foreign corporation, the very thing that incapacitates it, the inhibi-

tion is removed and the infirmity cured. Such statutes should be denominated remedial or curative statutes and not penal. Section 47 affords relief from the consequences flowing from a violation of section 46. Instead of incurring a penalty on account of such violation, it operates as a repeal of it *in toto*. It is a universal as well as a statutory rule here that in construing these sections such an interpretation must be given, if possible, as will permit both to stand. Here this can be done, and there is no conflict if we confine section 47 to the particular *cases* and *subject*-matter to which it refers. Besides, the intent of the Legislative Assembly must be consulted. It is easily gathered from the language. Had it intended to repeal section 46 by section 47 it would only have said: "Foreign corporations may do business here without filing a copy of its certificate of incorporation with the secretary of the Territory; but if it does not so file it, third parties suing it may prove that it is such foreign corporation by general representation." This is not the law or anything like it. The Legislative Assembly intended just two things: First, to prescribe terms upon which a foreign corporation could do business in this Territory; second, how proof could be made that it was such corporation. It did not intend that by such proof it should be relieved of the consequences of a failure to comply with the law. Does it deserve more protection than an infant? Is it entitled to more protection than a married woman? Is it any more unjust to provide the mode by which the one can acquire and dispose of property than the other? Is there any reason why disabilities should be imposed in the one case more than the other? Yet we have statutes defining the manner of acquiring and disposing of property by infants and married women as well as regulating the conditions upon which they may do business, and statutes similar to the one under consideration defining the mode of establishing infancy and coverture. The marital relation which establishes the incapacity of a *feme covert* to do busi-

ness might be established by a statute to that effect by showing general reputation or that the parties lived and cohabited together as man and wife. Could it be successfully contended that because the means of establishing this fact is provided by statute this disability is removed? That by proving the infirmity to exist this very proof by which you establish the fact corrects and remedies it? If it be conceded that a dead person cannot talk, is it not strange philosophy to say that by proof of death you establish the power to speak? Yet this is exactly what we are asked to do. The law says that a foreign corporation cannot do anything in this Territory without filing certain papers, and we are asked to conclude that upon using the evidence prescribed by the statute to establish that it is such a corporation you thereby concede its power to act. No; the true theory is that this evidence applies only to proof of the existence of a foreign corporation—*i. e.*, in the absence of the record required—and when this proof is made the consequences provided by section 46 necessarily follow.

By applying section 47 to cases wherein a person is suing a foreign corporation, and confining it to the character of evidence admissible in *such case* to establish that the defendant is a corporation, you can give section 46 its full force and the court can declare, after such fact is established, that it has no authority to do business of any nature or kind whatever in this Territory. The law is just to the citizens, not onerous on the corporation, and should be enforced in accordance with the *manifest* intent of the Legislative Assembly. It is not a matter of absolute right on the part of foreign corporations to do business outside of the jurisdiction in which it is created. It may be permitted to do so by sufferance, terms may be imposed upon it as conditions precedent to doing such business, or it may be entirely prohibited therefrom. The Legislative Assembly has seen proper to not prohibit foreign corporations from doing business here, but has prescribed the conditions upon which it

may be done and the evidence that may be introduced to establish that it is a foreign *corporation* to render section 46 applicable and operative. It is a salutary law and should be strictly enforced. This much we have said upon the interpretation of our statute, which, in connection with the subjoined authorities, we contend establishes the correctness of the conclusions arrived at.

1st. Foreign corporations have no legal existence in any other State or Territory than that of their creation.

Bank of Augusta *vs.* Earle, 13 " Peters' U. S.," 538, 519.

2nd. Legislatures of other States or Territories may exclude them altogether from *doing business within* their limits, or impose such *conditions* or *qualifications* as they may see proper *before permitting* them to *exercise any rights* therein.

Lafayette M. Co. *vs.* Finch, 18 Howard, 407.
Ducot *vs.* City of Chicago, 10 Wallace, 400, 410.
Pane *vs.* Virginia, 8 Wallace, 168.
Cooley on Statutory Limitations, page 285.
Vol. 16, No. 9, page 554, American Law Register.
Pane *vs.* Virginia, 8 Wallace, 168, 180.
State *vs.* Cent. Pac. R. R., 10 Nevada, 47, 386.
Bank of Augusta *vs.* Earle, 13 Peters' U. S., 538.
Day *vs.* Newark Manufacturing Co., 1 Blackford, 628.
Pomeroy *vs.* N. Y. & New Haven R. R., 4 *id.*, 120.

3rd. It is for the court to say whether from the whole statute the Legislature intended to impose these conditions or qualifications upon such corporation as a condition precedent.

Lester *vs.* Howard Bank, 33 Md., 558.
In re Comstock, 3 Sawyer, 218, 219.

4th. The general principles of interpretation of statutes obtained in such cases, and such construction will be given as will enable all the provisions thereof to stand, if it can be

done. Effect, if possible, will be given both sections 44 and 47.

Pangburn *vs.* Westlake, 36 Iowa, 546.

5th. Even when prohibitions are prescribed and a *penalty* attached, it must clearly appear that the law *only intended* a *penalty* before the court will refuse to give effect to the prohibitory clause.

Lester *vs.* Howard Bank, 33 Md., 558.
55 Ill., 85.
Utley *vs.* Clark & Gardiner Mining Co., 4 Colorado, 369.
Vol. 16, No. 9, page 554, American Law Register.
Pane *vs.* Virginia, 8 Wallace, 168, 180.
State *vs.* Cent. Pac. R. R., 10 Nevada, 47, 386.
Bank of Augusta *vs.* Earles', 13 Peters' U. S., 538.
Day *vs.* Newark Manufacturing Co., 1 Blatchford, 628.
Pomeroy *vs.* N. Y. & New Haven R. R., 4 *id.*, 120.
Blosburg & Corning R. R. *vs.* Vioga R. R., 5 *id.*, 387.
Bank of British Columbia *vs.* Paige, 6 Oregon, 431.
3 Colorado (Utley *vs.* Clark & Gardiner Mining Co.).
Chicago Legal News, Aug. 17, 1878.
Ohio & Miss. R. R. *vs.* Wheeler, 1 Black, U. S., 286.

6th. The only penalty in the law is a prohibition from doing or carrying on *any* business in the Territory without filing the paper required. This penalty so attached amounts to a prohibition, and plaintiff could neither acquire property or sue to protect it, as both require the transaction of business.

Lyon *vs.* Armstrong, 6 Vt., 219.
Robeson *vs.* French, 12 Metc. (Mass.), 24.
Gregg *vs.* Wyman, 4 Cush., 322.
Pater *vs.* Greeley, 13 Metc., 284.
Ohio & Miss. R. R. *vs.* Wheeler, 1 Black, U. S., 286.
Chicago Legal News, April 20, 1878.
Second Central Law Journal, '88, 4th ed., 463.

II.

By reference to record (page 24) it will be seen that the court refused the seventh instruction offered by defendant "for the fact that the original location of the Garfield mining claim is not questioned in the pleadings or testimony." The allegations upon which plaintiff bases its right of recovery are ownership, possession, and right of possession. Each of these allegations are specifically denied, as appears by the pleadings. Two things necessarily follow from these denials: First, it puts the plaintiff's *title* and *right* of *possession* in issue, and consequently involves every essential fact and element required to support them. Second, it cast upon the plaintiff the burthen of maintaining and proving them upon the trial. Hence, if the issue is properly made, plaintiff and not defendant is responsible for a failure in such proof. While we are unwilling to concede that a general allegation of title and right of possession is proper pleading in an action like this, where the title in fee is wanting, and believe that the *facts* constituting plaintiff's *right* of possession should have been set out, yet if his title, as alleged, is to be supported, and must be supported by establishing a group or series of facts which show a title less than a fee—*i. e.*, only right of possession—then we take it that a denial of the title alleged necessarily put in issue the facts plaintiff should establish under his allegations. In other words, under our system of pleadings, an averment in the answer that plaintiff or his predecessors never made any valid location or record of his claim is neither new matter nor a counter-claim. It is simply a denial of title, *treated* as an *issuable* fact throughout this case. Plaintiff, failing to produce a patent, was compelled to show such facts as gave him a right of possession, as decided in the case of Belk *vs.* Meagher *et al.*, 104 U. S., p. 279, with which this Court is familiar. He must show that the property was subject to

location, and that a valid location and record was made. As said in this case, *right of possession* follows only a valid location, and this is the very question to be tried under the laws of Congress, under which plaintiff and his predecessors claim. To show that every fact necessary to be established in the Land Office and to entitle the plaintiff to a patent here is superseded by the fact that upon the presentation of the judgment-roll in this and other similar cases the patent, under the statute, must issue. No further proof is required. It would be absurd and contrary to the spirit and intention of the mineral act to say that one who for any cause was not entitled to enter through the Land Office could cover the infirmity by recovering a judgment in a court of law. Not so; the court, in cases where its judgments *ipso facto* entitle the party in whose favor it is rendered to a patent, will hold him to the identical proof required in the laws; otherwise we have Congress granting patents through the Land Office upon conditions and through the courts upon other and different conditions. The want of capacity of the plaintiff to take public lands cannot even be waived by a defendant in a suit by a failure to plead this incapacity. The power to dispose of the public lands is vested in Congress, and the courts, when its judgments are *res adjudicata* as to all matters necessary to acquiring a patent, cannot in good faith ignore the necessary proof under the law in such cases. Hence, in *cases like the one at bar*, where the right to acquire public land is dependent upon it and the judgment of the court becomes conclusive of such right, we think the citizenship of the applicant for patent must be affirmatively shown. If plaintiff had set up all the facts necessary to constitute a right of possession and entitle it to a patent, citizenship, location, and record would have been required, and the defendant, instead of being called upon to deny title (which, for the purposes of this case, must be said to deny these facts), would specifically deny each of these allegations and put the plaintiff upon proof of them. This, we claim, is the

proper practice and the only means of protection to both the *Government* and the *citizen*. In the case at bar the question of a want of citizenship is not such as requires the defendant to avail himself of it by plea or proof to defeat the plaintiff's action, but it is a condition precedent to his right to maintain it and, for the *purposes of this case—i. e., to obtain a patent*—he must prove it. We submit that any other rule would utterly pervert the mineral act and defeat the manifest intention of Congress in enacting it. It is a well-settled principle that when a record is made *prima facie* evidence of its contents only such matters as are necessary and properly contained in it will be considered when introduced in evidence. The law nowhere requires or makes the *citizenship* of the locator a part of the record, and it could under no circumstances, consequently, be considered as establishing this fact. The record, therefore, if *prima facie* evidence of anything, is confined to such facts as are by law required to be in it. This bears no evidence of citizenship whatever, and the instruction requested should have been given. The same, in so far as the pleadings are concerned, may be said of the record of location as found on page 16 of the transcript. If, as we contend, under the denials mentioned, it became necessary for plaintiff to show that this claim had been segregated from the mass of public domain and the right to the possession vested in it by a location and recordation thereof, the validity of this location and record becomes a vital question. It was introduced to support the title of plaintiff, and if the objections to it were well taken the case should be reversed on that account.

Under the statutes of the United States three things are indispensable to the validity of this record: The name of the locator, the date of location, *and a reference to such natural objects or permanent monuments as will identify the claim.* The first two are properly set out in the record, but we assert that no reference is made to any *natural object or permanent monument* that will identify the claim. It is of

the utmost importance to the Government, not only to know to *whom* it parts with a portion of the public domain, but *what portion* of it is parted with. Not being conveyed in legal subdivisions by which the *locus in quo* can be easily identified, it has provided other means by which its officers can ascertain from the *record* the precise piece of property it has granted. Being descendible without requiring the locator or his successors in interest to ever procure a patent for it, the statute contemplates that it must be so marked upon the surface that its boundaries can be readily traced, and that the record must be such as will permanently identify the claim. They must be so connected as that no change in the one or the other can be made in any material respect without detection. Both are also to operate as a notice to persons entitled under the law to occupy the public lands. The location must show for itself upon the ground and the record must be such of itself that a competent surveyor can take it in one hand and his instruments in the other and trace out the claim. Hence, the initial point must be a *natural object or permanent monument.* If not, when desirable the locator can make it applicable to any piece of mineral lands of like dimensions. He can change his stakes, and unless the record ties him down by an immovable object or monument, he has a floating claim which he can locate wherever the greatest inducements are offered. The initial point in this record is *discovery stake.* No other description is given. No reference is made to any natural object or permanent monument by which its identity can be established or its perpetuity fixed. He may move it anywhere coextensive with the limits of the "Vaughan Mining District" and this record will apply to it equally as well as it does at the present. The Government could never tell with certainty what lands had been withdrawn from market, and this floating claim is likely at any time to jeopardize the rights of a discoverer whom it has encouraged to develop its mineral resources. If the statute is carried out the

locator is designated ; the date of location is fixed so as that it cannot be dated back to intercept a prior grant, and the particular property granted is so identified that it cannot be floated at the pleasure of the locator or his successors in interest, nor can it be moved at the instance of others, so as to deprive him of his claim. All these were intended to be accomplished, and unless it is done there is no such compliance with the law as will secure the grant. We insist that the record in this case is fatally defective in the particular mentioned and should have been excluded under the objections made to it.

III.

The record shows that a copy of a copy of the certificate of incorporation and copies of record of deed, certified to by the recorder, were admitted in evidence without further proof, under objections of defendants, and to the admission of which exceptions were duly taken. It will become necessary to examine the statute upon this question, as under no circumstance could these be admitted under the common-law rules of evidence without first accounting for the original and then proving that the documents offered were *copies* of it. In so far as the copy of the copy of certificate is concerned we find no provision of the statute whatever that refers to it *in terms*, and we do not think such an invasion upon the general rule should be made by implication. The statute, as will be seen, refers to *original instruments* and not copies. It was intended to be confined to them alone and not extended to copies or what purported to be copies of them. It cannot be fairly implied that the Legislature intended to or did so far open the gates to the perpetration of fraud as this.

As to the admission of the copies of certain deeds, the ruling of the court below was certainly erroneous and in

contravention of the well-established rule of evidence requiring a fact to be proven by the best evidence obtainable. The originals were not produced and it became necessary to prove it according to the established rules of proving documents by secondary evidence.

First. The original must be accounted for to the satisfaction of the court.

Second. The instrument offered as a copy must be shown to be such by persons who have compared it.

The statute never intended to dispense with the former. It only dispenses with the latter in so far as to make the certified copy *prima facie* evidence. By giving it this interpretation all the other provisions of the statute upon this subject, as we shall hereafter see, can have full effect and there will be no conflict. Otherwise the two sections made applicable to this matter are absolutely repealed.

The only sections of the statute we have been able to find bearing upon this question is section 525, page 139, which we have heretofore quoted; section 609, page 154:

"There can be *no evidence* of the *contents* of a *writing other* than the *writing itself*, except in the following cases: * * * 'When the original is a *record* or other *document* in the custody of a public officer.' 'Where the *original* has been recorded and a *certified copy* of the record is *made evidence* by this *code* or *other statute*.'"

Section 187, page 440, refers to proof of the execution of the instrument.

Section 394, page 490, refers to papers on file and transcript from the books of record kept therein. It is a part of the general law applicable to county clerks and refers to the records made by him under direction of the board of county commissioners. A book of record *kept by him* is a book of original entries.

We claim that the following two sections are applicable to the question involved, and, in connection with 609, referred to, should control the decision of the Court in that behalf:

"SECTION 205. Every conveyance or other instrument conveying or affecting real estate, which shall be acknowledged or proved, and certified as hereafter prescribed, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof."

This applies, of course, to the original instrument.

Section 207 was enacted expressly with reference to the questions involved, and, of course, should control a general provision which by its terms would seem to include the same propositions in *a general way.* This, we believe, is the rule of interpretation. If a statute is made applicable especially to a given state of affairs it will control a general statute which might include the same subject. It reads as follows, referring to the section preceding it:

"Where any such conveyance or instrument is acknowledged or proved, certified, and recorded in the manner hereinafter prescribed, and it shall be shown to the court that such *conveyance* or *instrument is lost* or *not within the power of the party wishing to use the same,* the *record thereof,* or *the transcript of such record,* certified by the recorder under the seal of his office, may be read in evidence without further proof."

Here we have the exact instrument described, duly acknowledged, and recorded, conveying real estate, and a certified copy offered. Defendant objected for the reason that the original was not accounted for. The court overruled the objection and signed the exception. It would seem that there is no escape from the conclusion that there was error in admitting this certified copy of this *conveyance* without the further proof required. We have carefully examined the statutes in order to relieve the Court of as much labor

as possible and believe that the foregoing sections referred to are all that bear upon this question, and invite the attention of the Court especially to this matter. We insist that there is error in the admission of the certified copies of these deeds without the further proof of the loss. It cannot be that a party can have the original in his pocket and introduce a copy. The *best* evidence should be resorted to—the certainty of the original, not the uncertainty of the copy.

Concerning the question asked the witness Orth, namely, "Whether if certain work had been done he would have known it," it seems to us to have been one way of showing a fact which was material in the case. The fact sought to be shown was a physical one, which was determinable from appearances, and the form of the question was well calculated to elicit an intelligent response. It was not necessary to show that the witness was an expert. The right of cross-examination was open to the plaintiff, by which the witness' means of information may have been challenged. It might have appeared that he had taken measurements and was prepared to speak advisedly.

In conclusion, we think the affidavits of the several parties filed in the case are sufficient to have entitled the defendants to a new trial. The newly discovered evidence was not cumulative, but went directly to destroy the testimony of the only witness to the proof of representation—testimony which in the nature of things could not have been produced upon the trial, because, as shown by the affidavits, it was not known to defendants by whom the representation work would be proven.

Respectfully submitted.

EDWIN W. TOOLE &
JOSEPH K. TOOLE,
Counsel for Plaintiff in Error.

FILED
MAR 13 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the U. S.

AUGE O. HAMMER,
Plaintiff in Error,
vs.
THE GARFIELD MINING AND MILLING CO.,
Defendant in Error.

No. 207.

BRIEF OF EPPA HUNTON,

Counsel for Defendant in Error.

IN THE

Supreme Court of the U. S.

AUGE O. HAMMER,
Plaintiff in Error,
vs.
THE GARFIELD MINING AND MILLING CO.,
Defendant in Error.

No. 207.

BRIEF OF EPPA HUNTON,
Counsel for Defendant in Error.

This action was instituted in the District Court of the 3rd Judicial District of the Territory of Montana, under an act of the Territorial Legislature found in compiled statutes of Montana, Sec. 366, page 160.

This law provides that an action may be brought by any person in possession by himself or his tenant of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest. Under this act the plaintiff below (the defendant in error) instituted this action and in his complaint found on page 1 of the record averred that it was a body corporate duly organized under the laws of the State of New York for carrying on the business of mining and milling ores bearing gold, silver and other precious metals in the Territory of Montana and had complied with all the laws of Montana relative to foreign corporations.

That it is the owner and in possession of a certain quartz lode mining claim in said Territory called the Garfield lode.

That it and its predecessors in interest have been ever since the discovery and location of the lode in possession of the same and were legally entitled to such possession. That notwithstanding its right to such possession the defendant (now plaintiff in error) on or about the 1st day of January, 1883, assumed to enter upon the premises and to relocate the same as the Kinna lode and pretends to claim an interest or estate therein and possession thereof adversely to it, and by virtue thereof has made application to obtain patent for said lode.

That the plaintiff below filed its adverse claim to the claim of defendant below. That further proceedings in the local land office in regard to these claims were stayed, and will continue to be stayed till the right to the possession of this lode is determined by the court. That the claims of the said Auge O. Hammer, and also of John Kinna and Lucien W. Bliss (the two last of whom were supposed to make some claim adverse to both the plaintiff and defendant in error) are without right and that neither has any estate, title or interest or right to the possession of said premises. That said complaint concluded with the prayers:

1st. That defendants (below) may be required to set forth the nature of their claims and that all claims may be determined by decree of the court.

2nd. That it may be declared that the defendants have not nor has either of them any interest or estate in or right to the possession of said premises and that the title of plaintiff below is good and valid, and that said plaintiff is entitled to the possession of the premises.

3rd. That defendants below be forever debarred from asserting any claim to the premises.

The defendants below demurred to this complaint—see record page 324. The defendant Hammer withdrew his demurrer and answered the said complaint denying the allegations thereof and averring that on the 1st day of January, 1883, one Iner Wolf entered upon the said premises, the same being vacant mineral lands of United States, and located the same according to law as the Kinna lode. That afterwards, on the day of January, 1883, the said Hammer became the purchaser of the Kinna lode and that he and the said Wolf had been the owners and held possession of the premises since the 1st day of January, 1883, and that said Hammer is now entitled to the possession of same. That the said plaintiff below had forfeited whatever claim he ever had to said premises prior to the 1st of January, 1883. The said plaintiff below replied to this answer and denied all its allegations. The cause was tried before a jury at the bar of the said court and the trial resulted in a verdict for the plaintiff. The defendant thereupon moved for a new trial and founded his motion on specifications of errors that evidence is insufficient to justify the verdict and upon errors of law set out in full on page 25 of record. This motion was overruled and judgment was given for the plaintiff below. Record page 27 and 29. The demurrer of the other defendants in the court was not withdrawn or or passed upon. The issue in this cause was made and tried between the plaintiff below and defendant Hammer.

The defendant below, Hammer, carried this case to the Supreme Court of the Territory, and at the August term, 1885, of said court the judgment of the District Court was affirmed. See record page 39.

That it and its predecessors in interest have been ever since the discovery and location of the lode in possession of the same and were legally entitled to such possession. That notwithstanding its right to such possession the defendant (now plaintiff in error) on or about the 1st day of January, 1883, assumed to enter upon the premises and to relocate the same as the Kinna lode and pretends to claim an interest or estate therein and possession thereof adversely to it, and by virtue thereof has made application to obtain patent for said lode.

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The defendant below, Hammer, carried this case to the Supreme Court of the Territory, and at the August term, 1885, of said court the judgment of the District Court was affirmed. See record page 39.

From this last decision the defendant Hammer, by writ of error, brought the case to this Court. The errors assigned in the brief of the counsel for the plaintiff in error are as follows:

SPECIFICATION OF ERRORS IN WHICH EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT.

The evidence is insufficient in this—

1. Because it fails to show that the parties who claim to have located the Garfield lode claim were citizens of the United States or had ever declared their intentions to become such.

2 Because the proof shows that the work necessary to represent said claimd for the year 1882 had not been done.

ERRORS OF LAW.

The court erred in overruling defendant's demurrer because the complaint did not state facts sufficient to constitute a cause of action, in this, to wit, the claim being unpatented land the complaint should set out every fact necessary in order to show that it was entitled to hold and possess the land under the laws of the United States.

The court erred in admitting in evidence copy of certificate of incorporation of plaintiff for the reason that the original was not accounted for, for the reason that the same was not properly authenticated, in this, the person who assumes to take the acknowledgment to the same does not attest the same with a seal and no authentication appears thereto that he was qualified to take acknowledgments.

The court erred in admitting copies of the several conveyances under which plaintiff claimed title, for the reason that the originals were the best evidence and they were not accounted for.

The court erred in admitting in evidence copy of location of the Garfield lode for the reason that the original was not accounted for, and for the further reason that the same was too indefinite and did not contain such a description as required by law, and because the same did not refer to such natural objects or permanent monuments as would identify the claim.

The court erred in refusing to allow defendant to ask of a witness the following question: "From the examination you made of the discovery shaft in 1881 and in June, July and August, 1882, are you able to state whether you would have known it if any work had been done, in June, 1882, in said shaft?" for the reason that the question was competent and was one means of showing that no work had been done on the shaft during that time.

The court erred in giving instruction No. 1, for the reason that the location notice under which plaintiff claimed was invalid, because it contained no sufficient description and because there was no evidence of a location made by any proper person, and because the court in said instruction assumes that such location is not questioned or put in issue by the pleadings, and so states to the jury.

The court erred in giving instruction No. 3, for the reason that it requires defendant to prove a forfeiture of plaintiff's title. When the pleadings put title in issue the plaintiff should be required to first show title and valid location,

The court erred in giving instruction No. 4, for the reason that plaintiff could not acquire or hold property until it had complied with the laws of the Territory respecting incorporations, etc.

The court erred in giving instruction No.4½, because the court permits a recovery without proof of the compliance by plaintiff with the conditions precedent required by the laws of this Territory, namely, filing in the proper offices of its certificate of incorporation.

The court erred in refusing to give instruction No.7, asked by the defendant, for the reason that the mining claim in controversy was unpatented land, and before the plaintiff was entitled to recover it was incumbent on it to show everything that was essential to show a valid location, and, among others, citizenship or a declaration to become such was essential upon the part of the locator.

The court erred in refusing to give instruction No.9, asked for by the defendant, for the reason that the filing of the papers mentioned in the instruction were essential to authorize plaintiff to acquire or hold said property.

THE FIRST ERROR ASSIGNED IS—

NEW TRIAL FOR INSUFFICIENT EVIDENCE.

The granting of a motion for a new trial because the evidence is insufficient to sustain the verdict is a matter of discretion in the court that tried the case, and the higher courts will not interfere unless there is also error of law. This Court will not interfere if there is only a question of the sufficiency of the evidence to justify the verdict.

In Railroad Co. *vs.* Fraloff, 100 U. S. Reports on page 31, this Court says: "No error of law appearing upon the record this Court cannot reverse the judgment, because upon the examination of evidence we may be of opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts or were governed by some improper influence or bias, the remedy therefor rested with the court below under its general power to set aside verdicts. * * * Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

Railroad Co. *vs.* Struble, 109 U. S. R., 384.
Wabash Ry. Co. *vs.* McDaniels, 107 do 456.

It is maintained the evidence was quite sufficient to sustain this verdict.

OVER-RULING DEMURRER.

1. The first error of law assigned (but not argued) is the overruling demurrer of plaintiff in error.

In this class of cases a complaint which alleges the ownership and possession to be in the plaintiff, and the adverse claim of defendant, and that such claim is without right states a legal cause of action.

Rough *vs.* Simmons, 65 Cal. 227.
Rough *vs.* Booth, 3 Pac. Rep. 805.

The complaint comes fully up to the requirement of these cases. But this question does not arise in the case because the demurrer of defendant Hammer was

withdrawn. See record page 4.

Admitting improper evidence of certificate of incorporation.

The next error assigned by the counsel for plaintiff is admitting in evidence certificate of incorporation of the plaintiff below for the reason that the original was not accounted for, for the reason that the same was not properly authenticated in this, the person who assumes to take the acknowledgment to the same does not attest it with a seal, and no authentication appears thereto that he was qualified to take acknowledgments; also erred in admitting copies of the several conveyances under which plaintiff below claimed title for the reason that the originals were the best evidence, and they were not accounted for; also in admitting in evidence copy of location of the Garfield lode for the reason that the original was not accounted for, and for the further reason that the same was too indefinite—did not contain such description as required by law and did not refer to such natural objects or permanent monuments as would identify the claim.

The last error assigned will be considered when instruction No. 1 is taken up.

As to admission of copy of certificate of incorporation.

Now the law of Montana requires the certificate of incorporation in another State, to be filed in Montana. This must of course be a copy because the original remains with the proper officer in the State granting the incorporation. Upon filing this the foreign corporation has the rights provided by statute. All that devolves upon a foreign corporation to show compliance

with section 46, is to show a proper record of the certificate of incorporation to the court. This was done when, according to the record page 9, the plaintiff below offered in evidence the record of a paper purporting to be the certificate of incorporation of the plaintiff below. It was not the introduction of a copy but of the record itself. If this was not proper evidence to make a prima facie case, then according to the laws of Montana, no foreign corporation can prove a compliance with her laws.

There can be no better way to show that a paper has been recorded than the production of the record itself. Section 46 provides for the recordation of a copy.

It will be shown further on that if the recordation provided for in section 46 was not properly done, the plaintiff below still had the right to do business and to sue in Montana. But it is objected *that certificate of incorporation was not properly made in New York.*

So far as the evidence in this case shows the certificate of incorporation was properly made in New York. It will be seen by reference to the record, page 11, that this certificate of incorporation was acknowledged by the incorporators before Fred. H. Maren, who signs himself a Notary Public, city and county of New York, but does not attest with a seal of office.

There is no evidence in the record to show that the laws of New York require such attestation, no evidence that Notaries of that State have seals. The certificate of William A. Butler, clerk, shows that the instrument is executed and acknowledged according to the laws of the State of New York.

Their copy of this instrument is certified to be correct by the clerk of the court of New York, and the Secretary of State, and in the absence of proof to the

contrary we are bound to presume that the laws of New York were complied with. This instrument was recorded in New York and there is no evidence to show it was not properly recorded under the laws of Montana. It was filed as a copy, and the law makes its record evidence. The laws of Montana do not prescribe how foreign corporations shall be incorporated by other States before doing business in Montana, but only prescribe that when incorporated they shall file a copy of their charter or certificate of incorporation as obtained. What was done in the State of New York towards incorporating this company cannot be inquired into in Montana, but if it becomes necessary to declare that it is no corporation the proceeding must be in New York, and must be taken by the State of New York by *quo warranto*.

IMPROPER ADMISSION OF DEEDS.

This assignment of error together with improper admission of location certificate of the Garfield lode, is discussed under the 3rd head in brief of counsel for plaintiff in error, page 18.

It is believed that every State and Territory in the United States has provided for the recordation of deeds, and also provided in some form or other for the admission in evidence of copies of such recorded papers, without producing the original.

The Territory of Montana is no exception to this general rule. Section 384, article 4, fifth division of the general laws is as follows:

"Copies of all papers filed in the office of Recorder of Deeds and transcripts from the books of record kept therein certified by him under the seal of his office shall be *prima facie* evidence in all cases." That is,

copies shall be prima facie evidence and "transcripts from the books of record kept therein certified by him under the seal of his office, shall be prima facie evidence where the paper introduced is proven to be a copy no certificate under seal is required, nor is any other certificate necessary. Section 609 of the civil code, page 154, as quoted in the brief for plaintiff error does provide:

"There can be no evidence of the contents of a writing other than the writing itself, except in the following cases:" And then the learned counsel gives two cases in which there may be other evidence, paragraph 3. "When the original is a record or other document in the custody of a public officer" and paragraph 4, "Where the original has been recorded and a certified copy of the record is made evidence by this code or other statutes."

But in further explanation the second clause of the 5th subdivision or paragraph provides that in the cases mentioned in paragraphs 3 and 4. A copy of the original or a certified copy must be produced.

Upon examination of the record it will be found that this was followed in each case. The record of the certificate of incorporation to show that the plaintiff below was an incorporation and had complied with the laws of Montana as to filing the certificate.

On page 12 of the record it is stated as part of the case as it went to the jury "Plaintiff offered in evidence the following copies of deeds on record in the county recorder's office" and then follows copies of all the deeds introduced by the plaintiff. It is submitted that this brings this evidence strictly within the 2nd clause of the 5th paragraph. They were copies of *the deeds* and were on record in the county recorder's office. This

applies to all the deeds. This position is very much strengthened by the fact that the deed from Iver Wolff to the plaintiff in error, and which was necessary to his defence was proven in the same way. See compiled statutes, 5th division, 839. McKinstry *vs.* Clark, 4 Mont., 370. Abbott's trial evidence, page 50, and authorities cited. Dick *vs.* Balch, 8 Peters 30. 1 Wharton on evidence, section 111.

The objection to admitting in evidence copy of location of the Garfield lode is met in the same way. The law required this location to be filed with recorder and to be recorded, and the plaintiff below introduced the record of the location. Record page 16 says: "Here plaintiff offered in evidence the record of the location of the Garfield mine." The law required this location to be recorded and to prove it the record was introduced. This was not objected to because the original was not produced, but because it did not in itself contain the requirements of the law, any other objection that might have been made and was not, was waived. Thomas *vs.* Lawson, 21 Howard, 331. See page 338.

It will be observed on page 18 of the record that defendant below proved his location in the same way exactly. "Defendant then introduced in evidence his *record* of location of the Kinna lode as follows: In both cases it was the original record, and it was the only way to prove that these locations were recorded as the law requires.

The record of location was too indefinite and did not contain such a description as required by law and did not refer to such natural objects or permanent monuments as would identify the claim.

And the plaintiff in error claims that it was no valid location and does not entitle the defendant in error to a patent.

There are only two objections to the admission of this record of location; first, for the reason that the original was not accounted for. This has already been noticed. Second, because it did not contain such a description as required by law, and did not refer to such natural objects or permanent monuments as would identify it.

This last will be considered; all others not made were waived.

The location record will be found on page 16 of record. The only trouble in following the metes and bounds of this location consists in finding the starting point or any other given point described in metes and bounds. If these stakes are standing there can be no difficulty—there is no evidence to the contrary—but the law requires a reference to some natural object or permanent monument. The location notice gives the distance of this lode from Vaughn's "Little Jennie" mine, and that it is in the county of Lewis and Clark.

This is a strict compliance with the law, and just such a description as the assignor of the plaintiff in error made of his Kinna lode. The corners, of which are also marked with stakes and the permanent objects are two other lodes, and states it is a relocation of what was formerly known as the Garfield lode, pages 18 and 19.

The only permanent objects in each are other lodes. The reference to two cannot be better than one, because after finding either one the location is known from this permanent object.

How could it have been known as the Garfield lode unless it referred to some natural object or permanent monument. The Garfield lode was so well and so properly located that assignor of defendant below referred to it as one of the permanent landmarks, in his location of Kinna lode. And is conclusive evidence that when the Kinna lode was located, it was because the locator supposed the right to the Garfield lode had been forfeited.

In refusing to allow the defendant below to ask the following question: "From the examination you made of the discovery shaft in 1881 *and in June, July and August,* 1882, *are you able to state whether you would have known it if any work had been done in June* 1882 *in said shaft." Record page* 17.

After the witness had testified to his acquaintance with the Garfield mining claim and that he was over it in 1881, and knew what work was done on the claim that year and that he had been there again in June and August, 1882, the counsel for defendant below asked this question "From the examination you made of the discovery shaft in 1881, and in June, July and August, 1882, are you able to state whether you would have known it if any work had been done in June, 1882, in said shaft?" This question was objected to by the plaintiff below and ruled out by the court it is confidently submitted this ruling was correct.

The first objection to this question is that it is leading and ought to have been ruled out on that account.

1 Wharton on Evidence, Section 499., note 1.

In the second place it calls for the opinion of the witness as to whether work had been done in the Garfield lode in June, 1882.

Such a question can be put to an expert only. There is no evidence tending to show that the witness was an expert. Without this preliminary evidence opinions are not admissible in this class of cases. He was no expert.

In Rogers on expert testimony, page 1, the rule is laid down as follows: "Strictly speaking an expert in any science, art, or trade is one who by practice or observation has become experienced therein."

He has been defined as a person of skill; as a skilful or experienced person; a person having skill, experience or peculiar knowledge on certain subjects or in certain professions; a scientific witness. An expert, said Mr. Justice Folger, in Nelson *vs.* Sun Mutual Insurance Co., 71 N. Y., 453, 460, is one instructed by experience, and to become one requires a course of previous habit and practice, or of study so as to be familiar with the subject."

Bird *vs.* Commonwealth, 21 Grattan 800.
Jones *vs.* Tucker, 41 N. H., 546.
State *vs.* Phair, 48 Ver., 366, 377.
Dickinson *vs.* Fitchburg, 13 Gray, 546-553.
1 Greenleaf's evidence, section 440.

The evidence does not disclose a single qualification of this witness as an expert.

No experience, skill, peculiar knowledge or science is possessed by this witness, and he cannot come under the head of an expert whose *opinion* is evidence. Not being an expert the question should have been directed to facts and not to opinions, or conclusions deducted from facts, which belongs to the jury.

But it is further maintained that this inquiry was one which forbade the examination of experts. It was

a plain inquiry and within the comprehension of plain witnesses. It was as to whether a certain amount of work had been done. In such cases expert testimony is not allowed. The rule is well laid down by Rogers in his work above quoted, at page 8, as follows:

"The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it for the reason that the subject-matter so far partaking of the nature of a science, art, or trade as to require a previous habit, experience, or study in it in order to acquire a knowledge in it."

In also the numerous authorities cited at bottom of page 8.

On page 12 the same author says:

"Whenever the subject-matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education, moving in ordinary walks of life, the rule is that the opinion of experts is inadmissible." See large number of authorities cited in note 1, to page 13, to sustain this text.

The question was therefore rightly excluded. See also:

Milwaukee Ry. Co. *vs.* Kellog, 94 U. S., 472.
Chicago *vs.* Greer, 9 Wal., 734.
Central P. R. R. Co. *vs.* Peak 35 Cal., 247.
1 Greenleaf on evidence, section 448.

GRANTING INSTRUCTION NOS. 1 AND 3.

While these instructions Nos. 1 and 3 do say " the validity of the original location of the lode is not ques-

tioned in the pleadings" and while this was an error yet as the Supreme court of the Territory says this error was not prejudicial to plaintiff in error because it goes on at once to direct that the jury must believe from the evidence all the facts necessary to a valid location and the attention therefore of the jury was specifically directed to the evidence necessary to show a valid location and they must believe from the evidence that all these facts did exist—This could not prdjuice the defendant below.

In Campbells' Exr. *vs.* Prall, 2 Peters, 354, this court refused to reverse a decree although an error had been committed as no benefit would result to the applicant from a reversaal.

In Greenlief's lessee *vs.* Birth 5 Peters, Mr. Justice Story in delivering the opinion of the court, page 134, says: "At the trial several exceptions were taken by the plaintiff to opinions expressed or refused by the court. As to some of these exceptions that are thus brought before us it is unnecessary to decide whether they are well or ill-founded; because in the progress of the cause it is apparant they worked no ultimate injury to the plaintiff, since independently of the matter therein stated it is admitted upon the record that the plaintiff made out a good title in his lessor, which was all the plaintiff proposed to establish by them * * There must be some injury to the party to make the matter generally assignable as error."

See also Johnston *vs.* Jones, 1st Black., 209.
Chittenden *vs.* Brewster, 2 Wal., 191.
Brobst *vs.* Brock, 10 Wal., 579.
Sergeant *vs.* Sturm, 25 Cal., 361.
St. John *vs.* Kidd, 26 Cal., 268-9.

Hebraid *vs.* Jefferson Co., 33 Cal., 290.
Brazier *vs.* Clap, 5 Mass., R. 10.
DeMerle *vs.* Matthews, 26 Cal., 467.
Green *vs.* Ophir Co., 45 Cal., 526.

When, therefore, the court instructed the jury that they must find all the facts necessary to make a valid location it was no error of which complaint could be made if the court said its validity was not questioned in the pleadings or testimony.

The only questions in this case were, first, was the plaintiff below holding under a valid location? If so possession necessarily follows from it. Belk *vs.* Meagher, 104 U. S. R., 279, and secondly, had the plaintiff below forfeited his right by failure to do the required amount of work. If the first point was settled by the jury on the evidence in favor of the plaintiff below then he had made out a case for recovery, and it had to be met and overturned by the defendant below by showing that plaintiff had in some way forfeited his right. This the jury found he did not do.

The whole case shows that the fight was made on the alleged forfeiture. The location of the Kinna lode sets out that it was what had been known as the Garfield lode; that is, had been known as the Garfield lode but the right thereto had been forfeited and hence the location of the same lode as the Kinna lode.

While the pleadings technically put the validity of the location in issue, the fight was on the forfeiture. The plaintiff below proved the validity of his location and the defendant failed to prove the forfeiture.

GRANTING INSTRUCTION NO. 4.

This instruction will be found on page 22 of record.

The court said in this instruction that strict proof of corporate existence is not required. That if acting as such in good faith, though there was not a strict compliance with the law then it was a corporation de facto.

That the failure of the corporation to file certificate as required by law did not cause a forfeiture of property or destroy its right to do business in the Territory.

In a previous part of this brief it is maintained the law was complied with; but if not still the plaintiff below has a right to go on with business and this suit.

This question was before the Supreme Court of Montana, in King *vs.* National Mining and Exploring Co., 4 Mont., 1, and notwithstanding the criticism of the learned counsel for plaintiff in error, Brief pages 7 to 12, the court did decide: "that foreign corporations are not prohibited from doing business in the Territory, though certificate of incorporation may not be filed." The original act was passed in 1867, and contained but two sections, which became sections 46 and 47, in the code of 1872.

And that act in its two sections contained the Legislative mind on the subject and both must be looked to in any construction given to either.

Judge Galbraith pronouncing the opinion of the court in the above case, 4 Mont. R., page 2, says: "Two questions arise in the case and are relied on for a reversal of the judgment they are important and entitled to a brief consideration: First the right of the respondent to do business in the Territory, it being, a foreign corporation and having failed to file a copy of its charter, as required by law." After reviewing the history of the two sections as taken from the act of 1867 he says: The two sections must be construed together." Citing Bradbury *vs.* Wagehart, 54 Penn. St. 180 says: "We are

led to conclude that Section 46 although its language is mandatory in its character and requires of foreign corporations the performance of the acts therein mentioned yet Section 47, therein prevents it becoming a statute of absolute prohibition and prescribes the consequences which shall result from a failure to comply with the provisions of Section 46, " *Expressio Unius exclusio alterius* is eminently applicable to and decisive of this question: Foreign corporations are therefore in our our opinion not prohibited from doing business in this Territory by failure to comply with requirements of Section 46.

This construction of the sections 46 and 47, seems to be plainly right. It is the construction of a statute of the Territory by the highest court of the Territory, and will be accepted by this court as the true and conclusive construction. Phalen *vs.* Virginia, 8 How., 169.

The learned counsel lays down the doctrine on page 12 of his brief that "Foreign corporations have no legal existence in any other State or Territory than that of their creation," and cites Bank of Augusta *vs.* Earle, 13 Peters, 538-9. This may be true, but having a legal existence in one State the comity existing between the States enables them to sue in any other State or Territory. The very case cited decides that this comity exists between separate and distinct nations and much more between states of the same brotherhood constituting one great Government.

It is admitted that States or Territories may exclude foreign corporations from doing business within their limits or impose conditions.

But it is maintained that the Legislation of Montana has not prohibited the plaintiff below from doing business in her limits because of failure to properly record

its charter &c., and that this has been the construction placed upon her legislation by her highest courts, which this court will adopt and follow.

This argument is made without conceding that the plaintiff below failed to comply with requirements of section 46.

It is argued elsewhere that it did comply.

"*Because the evidence fails to show that the parties who claim to have located the Garfield load were citizens of the United States or had ever declared their intention to become such.*" This comes under the head of motion for new trial for insufficient evidence which it has been shown will not be considered by this court.

But it is submitted that the evidence is complete on this subject. Section 2321 of Revised Statutes provides that "proof of citizenship under this chapter may consist in the case of an individual of his own affidavit thereof," chapter 6, "Mineral lands and Mining resources." When the notice of location of the Garfield lode was made by Julius Horst and E. F. Hardin the former made an "affidavit" that he and his co-locator were citizens of the United States. Their citizenship was proved. Being natural persons in a proceeding of this sort it will be presumed they are citizens. Cox *vs.* Gulick, 5 Holst., N. Y.

The United States officer was satisfied with the proof and received the location as valid. The defendant below cannot dispute it without evidence, if evidence was admissible, on that point. In the absence of proof the citizenship, if important to the case, will be presumed People ex rel. Smith *vs.* Pease, 27 N. Y., 45. The citizenship of the assignee (the plaintiff below) could not be raised because if a foreigner, or if not a citizen, and the law of Montana prohibits a foreigner to hold land

the title of plaintiff below is good till officer found. Phillips *vs.* Moore, 100 U. S. R., 208. Cross *vs.* DeValle, 1 Wal. R., 1. The plaintiff below is a corporation of New York, and the corporators are described as all of the city of New York. It cannot be that they will be adjudged foreigners without evidence—nor would evidence on that point be admissible in this case.

New trial on affidavit of newly discovered evidence.

The last error assigned and noticed in conclusion of counsel brief, is the refusal of court to grant a new trial on affidavit of newly discovered evidence.

The Supreme court of Montana in noticing this assignment of error page 37, says: in speaking of this affidavit "which was that the witness McDonald who testified to having done the work consituting the representation of the Garfield lode for 1882, had stated out of court and before the trial in the presence and hearing of two witnesses that he did not perform but two days' work on said Garfield mine for 1882. This newly discovered evidence could only affect the credibility of the witness McDonald. There is also an affidavit by witness McDonald contradicting the affidavit of these two witnesses and asserting he never made any such statement. The newly discovered evidence is cumulative. The record shows that the witnesses Orth and Arnold called by the defendant below testified on the trial substantially the same thing as is statetd in the affidavit relating to the newly discovered evidence.

It is by no means clear that this newly discovered evidence would have changed the result of the trial.

In Levetsky *vs.* Johnson, 35 Cal., 41, it is said "A party is presumed to know when he is ready for trial upon the main essential issues involved and he cannot be allowed a new trial after having submitted his case upon

such testimony as he thought proper to introduce in support of those issues of fact by a showing that he had subsequently discovered additional pertinent evidence upon the same issue unless it is clear that such evidence would have changed the result, and that the strictest diligence would not have enabled him to procure the same on the trial." The granting of a new trial rests in the sound discretion of the court and in refusing a new trial under the above circumstances we do not think the court abused its discretion."

Caruthers *vs.* Pemberton, 1 Mont., 111.

It is further submitted that this is a question that this Court will not examine as argued above.

It is believed that all the errors assigned have been argued and that there is no error in the judgment of the Supreme Court of Montana and that the same should be affirmed.

Respectfully submitted.

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